To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Tomasovic, Brian[Tomasovic.Brian@epa.gov]; Smith, Suzanne[Smith.Suzanne@epa.gov]
From: Payne, James
Sent: Thur 5/4/2017 2:59:41 PM
Subject: Fwd: TX Haze

Sent from my iPhone

Begin forwarded message:

From: "Schwab, Justin" <schwab.justin@epa.gov>
Date: May 4, 2017 at 9:57:13 AM CDT
To: "Coleman, Sam" <Coleman.Sam@epa.gov>
Cc: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Minoli, Kevin" <Minoli.Kevin@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Stenger, Wren" <stenger.wren@epa.gov>
Subject: Re: TX Haze

Thanks for the update.

Sent from my iPhone

On May 4, 2017, at 10:51 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

I talked to TX. They will submit comments on the BART FIP this week.

Samuel Coleman, P. E.,
Deputy Regional Administrator

214.665.2100 Ofc
214.665. 3110 Desk
214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Schwab, Justin[schwab.justin@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]; Hogan, Stephanie[Hogan.Stephanie@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Marks, Matthew
Sent: Thur 4/27/2017 9:33:05 PM
Subject: Document for TCEQ
Texas Regional Haze SIP - What EPA Needs - 04-27-2017.docx

Justin,

Please find attached the document we plan to give to TCEQ tomorrow. I have updated it to reflect the conversation we had with TCEQ earlier today. Your feedback is welcome. I am out of the office tomorrow, but I am sure Lea, Elliott, or Gautam will be happy to incorporate any changes you suggest and then deliver the document to Region 6.

Matt

To: Vaden, Christopher (ENRD)[Christopher.Vaden@usdoj.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Payne, James[payne.james@epa.gov]
From: Srinivasan, Gautam
Sent: Wed 7/26/2017 3:08:11 PM
Subject: FW: Texas Regional Haze DRAFT MOA
DRAFT MOA_v4.docx

Chris- Per your email, attached is the draft MOA. As you will see below, Stephanie Talbert and Eileen McDonough received it. Stephanie has already reviewed.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Payne, James
Sent: Tuesday, July 25, 2017 7:52 PM
To: Schwab, Justin <schwab.justin@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Cc: Smith, Suzanne <Smith.Suzanne@epa.gov>
Subject: Fwd: Texas Regional Haze DRAFT MOA

Forwarding attached end-of-day draft MOA, and copying below the response already rec'd from one of the two reviewing DOJ trial attorneys.

Jim

214-665-8170

214-490-6707 cell

COMMENT FROM STEPHANIE, DOJ TRIAL ATTY

Ex. 5 - Attorney Work Product, Attorney Client

Stephanie

(DOJ)

Sent from my iPhone

Begin forwarded message:

From: "Thomas, Carrie" <Thomas.Carrie@epa.gov>
Date: July 25, 2017 at 6:41:53 PM CDT
To: "Stenger, Wren" <stenger.wren@epa.gov>, "Payne, James" <payne.james@epa.gov>, Eileen McDonough <eileen.mcdonough@usdoj.gov>, "Talbert, Stephanie (ENRD)" <Stephanie.Talbert@usdoj.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>, "Donaldson, Guy" <Donaldson.Guy@epa.gov>
Cc: "Watson, Lucinda" <Watson.Lucinda@epa.gov>, "Olszewski, Joshua" <olszewski.joshua@epa.gov>, "Nwankwo, Adaobi" <Nwankwo.Adaobi@epa.gov>, "Marks, Matthew" <Marks.Matthew@epa.gov>, "Beaver, Melinda" <Beaver.Melinda@epa.gov>
Subject: RE: Texas Regional Haze DRAFT MOA

Revised to address an additional comment from Sam in the last WHEREAS clause.

Carrie K. Thomas
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6
1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-7121
Fax: (214) 665-2182

To: Zenick, Elliott[Zenick.Elliott@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
From: Marks, Matthew
Sent: Tue 4/25/2017 5:49:38 PM
Subject: RE: TX Regional Haze
4_20 TX RH SO2 BART briefing - mcm changes before distribution to state.docx

Also, here are the edits I would make to the document that was used to brief Sarah D. before it is shared with the state. Lea may also have thoughts.

From: Marks, Matthew
Sent: Tuesday, April 25, 2017 1:35 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: RE: TX Regional Haze

Ex. 5 - Deliberative Process, Attorney Client

Ex. 5 - Deliberative Process Monique never got back to me because she is out apparently. Carla was going to help with Justin's schedule, but I'm not sure what to tell her now given Sam's indication that Jim Payne is scheduling. Ex. 5 - Deliberative Process, Attorney Client

Ex. 5 - Deliberative Process, Attorney Client

From: Zenick, Elliott
Sent: Tuesday, April 25, 2017 1:32 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: RE: TX Regional Haze

Ex. 5 - Deliberative Process

From: Schmidt, Lorie
Sent: Tuesday, April 25, 2017 1:31 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>
Subject: FW: TX Regional Haze

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Tuesday, April 25, 2017 1:27 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Payne, James <payne.james@epa.gov>
Subject: TX Regional Haze

I just spoke to Chairman Shaw. He is urging that we complete the legal call ASAP. Jim Payne is trying to schedule. Looks like there is availability tomorrow.

Ex. 5 - Deliberative Process

Please help with the schedule if possible.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Zenick, Elliott[Zenick.Elliott@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
From: Marks, Matthew
Sent: Tue 4/25/2017 5:35:30 PM
Subject: RE: TX Regional Haze

Ex. 5 - Deliberative Process, Attorney Client

Ex. 5 - Deliberative Process Monique never got back to me because she is out apparently. Carla was going to help with Justin's schedule, but I'm not sure what to tell her now given Sam's indication that Jim Payne is scheduling. Ex. 5 - Deliberative Process, Attorney Client
Ex. 5 - Deliberative Process

From: Zenick, Elliott
Sent: Tuesday, April 25, 2017 1:32 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: RE: TX Regional Haze

Ex. 5 - Deliberative Process, Attorney Client

From: Schmidt, Lorie
Sent: Tuesday, April 25, 2017 1:31 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>
Subject: FW: TX Regional Haze

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Tuesday, April 25, 2017 1:27 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Payne, James <payne.james@epa.gov>
Subject: TX Regional Haze

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Ex. 5 - Deliberative Process

Please help with the schedule if possible.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
From: Zenick, Elliott
Sent: Tue 4/25/2017 5:32:21 PM
Subject: RE: TX Regional Haze

Ex. 5 - Deliberative Process, Attorney Client

From: Schmidt, Lorie
Sent: Tuesday, April 25, 2017 1:31 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>
Subject: FW: TX Regional Haze

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Tuesday, April 25, 2017 1:27 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Payne, James <payne.james@epa.gov>
Subject: TX Regional Haze

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Ex. 5 - Deliberative Process

Please help with the schedule if possible.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Srinivasan, Gautam
Sent: Tue 4/25/2017 4:37:20 PM
Subject: FW: Regional Haze

FYI. Lorie and I had a conversation with Jim. Let's catch up.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Payne, James
Sent: Tuesday, April 25, 2017 12:28 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>
Subject: Fwd: Regional Haze

Sent from my iPhone

Begin forwarded message:

> **From:** "Coleman, Sam" <Coleman.Sam@epa.gov>
> **Date:** April 24, 2017 at 11:28:19 AM CDT
> **To:** "Stenger, Wren" <stenger.wren@epa.gov>, "Payne, James" <payne.james@epa.gov>
> **Subject: FW: Regional Haze**
>
> FYI
>
> Samuel Coleman, P.E.
>
> Deputy Regional Administrator
>
> EPA Region 6
>
> coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Coleman, Sam [mailto:Coleman.Sam@epa.gov]
Sent: Sunday, April 23, 2017 8:38 PM
To: Dunham, Sarah <Dunham.Sarah@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>
Subject: Regional Haze

The Administrator was in Dallas late Friday. I spoke to him for 1 minute. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

No specific ask, but I wanted you to know the origin of any questions you might get.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Smith, Suzanne[Smith.Suzanne@epa.gov]
From: Payne, James
Sent: Tue 4/25/2017 4:28:09 PM
Subject: Fwd: Regional Haze

Sent from my iPhone

Begin forwarded message:

From: "Coleman, Sam" <Coleman.Sam@epa.gov>
Date: April 24, 2017 at 11:28:19 AM CDT
To: "Stenger, Wren" <stenger.wren@epa.gov>, "Payne, James" <payne.james@epa.gov>
Subject: FW: Regional Haze

FYI

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Coleman, Sam [mailto:Coleman.Sam@epa.gov]
Sent: Sunday, April 23, 2017 8:38 PM
To: Dunham, Sarah <Dunham.Sarah@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>
Subject: Regional Haze

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Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

No specific ask, but I wanted you to know the origin of any questions you might get.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Zenick, Elliott
Sent: Mon 4/24/2017 4:59:04 PM
Subject: FW: Write-up With Background on TCEQ Legal Objections

I think it would be helpful if Justin could participate in this conversation and intended to mention it at reg review.

From: Thomas, Carrie
Sent: Monday, April 24, 2017 12:55 PM
To: Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>
Cc: Smith, Suzanne <Smith.Suzanne@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Subject: RE: Write-up With Background on TCEQ Legal Objections

Hi Folks,

Sam has directed us to have the follow-up discussion with TCEQ legal sometime this week

Ex. 5 - Deliberative Process

Who from OGC should participate? Is there a need for an internal pre-call? Some of our key participants are not available until Thursday; is that workable? We have not reached out to TCEQ for scheduling yet.

Thanks,

Carrie K. Thomas
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6
1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-7121
Fax: (214) 665-2182

From: Tomasovic, Brian
Sent: Friday, April 21, 2017 10:57 AM
To: Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Payne, James <payne.james@epa.gov>; Donaldson, Guy <Donaldson.Guy@epa.gov>
Subject: RE: Write-up With Background on TCEQ Legal Objections

Thanks Stephanie,

Ex. 5 - Deliberative Process, Attorney Client

From: Hogan, Stephanie
Sent: Friday, April 21, 2017 10:01 AM
To: Tomasovic, Brian <Tomasovic.Brian@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Payne, James <payne.james@epa.gov>; Donaldson, Guy <Donaldson.Guy@epa.gov>
Subject: RE: Write-up With Background on TCEQ Legal Objections

Ex. 5 - Deliberative Process, Attorney Client and

Ex. 5 - Deliberative Process, Attorney Client

Stephanie L. Hogan | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

From: Tomasovic, Brian

Sent: Friday, April 21, 2017 10:33 AM
To: Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Payne, James <payne.james@epa.gov>; Donaldson, Guy <Donaldson.Guy@epa.gov>
Subject: RE: Write-up With Background on TCEQ Legal Objections

Matt,

To your point on hearing precisely what was communicated in the prior call--here's a contemporaneous email (attached). Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process, Attorney Client

Stephanie,

I have a response to part of your email below. (You may want to read the attachment on my Wed. night email for orientation, if you haven't done so).

From: Hogan, Stephanie

Sent: Friday, April 21, 2017 8:22 AM
To: Marks, Matthew <Marks.Matthew@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Payne, James <payne.james@epa.gov>
Subject: RE: Write-up With Background on TCEQ Legal Objections

I'd also like to understand this better. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process, Attoreny Client

Stephanie L. Hogan | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

From: Marks, Matthew
Sent: Friday, April 21, 2017 9:11 AM
To: Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Cc: Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Payne, James <payne.james@epa.gov>
Subject: Re: Write-up With Background on TCEQ Legal Objections

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

I think an internal call prior to a call with TCEQ would make sense so that we are all on the same page about the relevant state law provisions and what precisely was communicated in the prior call.

Sent from my iPhone

On Apr 20, 2017, at 10:45 PM, Tomasovic, Brian <Tomasovic.Brian@epa.gov> wrote:

Elliot and Kristi,

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Caroline Sweeney is who Jim Payne would be calling about setting up another call, if we believe we need one. Preferably, Jim would be able to explain the need for a new call based on certain HQ attorneys needing to join/rehear the discussion or new questions.

Threshold Questions:

1. Does anything about my write-up change the need for a call? Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process, Attorney Client

2. If we are to have a call, what is the set-up to be? Should there be a pre-call regarding my write-up or anything else? Do you envision who you is expected for HQ participation?

We'll appreciate your input on how to proceed.

And I'll be pleased to set up any internal call or answer any questions about the attached write-up.

Brian

Brian Tomasovic

U.S. EPA Region 6 | Office of Regional Counsel

tomasovic.brian@epa.gov | 214.665.9725

<Writeup on Background of Legal Objections for Laywer to Laywer Discussion.docx>

To: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
Cc: Tomasovic, Brian[Tomasovic.Brian@epa.gov]; Smith, Suzanne[Smith.Suzanne@epa.gov]
From: Payne, James
Sent: Mon 5/22/2017 9:07:48 PM
Subject: FW: EPA Regulatory Reform
051517-StateofTexasAG-CommentLetter-combined.pdf
ATT00001.txt

FYI

-----Original Message-----
From: Caroline Sweeney [mailto:caroline.sweeney@tceq.texas.gov]
Sent: Monday, May 22, 2017 11:21 AM
To: Coleman, Sam <Coleman.Sam@epa.gov>
Cc: Lori Wilson <Lori.Wilson@tceq.texas.gov>
Subject: EPA Regulatory Reform

Hi Sam,

As requested, attached is the letter from our attorney general.

Thanks - Caroline
TCEQ

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 15, 2017

Honorable Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, MC 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

via regulations.gov

Re: Docket ID No. EPA-HQ-OA-2017-0190, Comments from Texas concerning stay of imminent regulatory deadlines for existing regulations currently subject to litigation and abatement of such litigation pending review of each rule.

Dear Administrator Pruitt;

We write in response to the Environmental Protection Agency's (EPA's) request for comment concerning the agency's internal review and evaluation of existing regulations. *See* 82 Fed. Reg. 17,793 (Apr. 13, 2017). We ask that the EPA Regulatory Reform Task Force consider these comments regarding EPA regulations currently subject to judicial review. The goals stated in Executive Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), if achieved, will help return our country to an era of less burdensome federal regulation and greater cooperation between the federal government and states in environmental regulation.

Cooperative Federalism Principles are Embodied in Environmental Law.

Cooperative federalism is an important principle in our country. This is because "the role of the States as laboratories for devising solutions to difficult legal problems" is long recognized. *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). To this point, we recognize that deference to the States "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Therefore, when it comes to relations between the States and the federal government, the Supreme Court has admonished the importance of seeking the appropriate "federal balance." *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2659 (2012). The power to spend money, for example, "without concern for the federal balance, has the potential to obliterate

distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *NFIB*, 132 S. Ct. at 2659. The same is true when the federal government exercises its regulatory power. For only if the States are able to experiment, so that we may learn lessons from our collective experiences, will the depth and breadth of the potential of our Union be fulfilled. [1]

Litigation and Regulation Enforcement Should be Suspended Pending Agency Reconsideration.

Unfortunately, as you are aware, the previous administration was unwilling to engage with most states, and took actions or issued rules ignoring the spirit of cooperative federalism embodied in the Clean Air Act and Clean Water Act. *See* 42 U.S.C. § 7401(a)(3), 33 U.S.C. § 1251(b). As a result, Texas and others, along with industry representatives, were routinely forced to seek judicial review of many of the EPA's actions. Enclosed at Attachment 2 is a list of pending actions in which Texas is still involved.

The issue statements and briefs filed in the list of pending actions articulate why each of the challenged rules or actions are arbitrary and capricious, not in accordance with the law, are unnecessary or ineffective, impose costs that exceed benefits, and otherwise create serious inconsistency with the initiatives described in Executive Order 13777. Enclosed at Attachments 3A and 3B are the petitions for review and statement of issues filed by Texas in each of the matters.[2] For the reasons discussed in the filings concerning each of the rules listed in Attachment 1, we request that each of those rulemakings be reconsidered and that any imminent regulatory deadlines be suspended pending your Agency's reconsideration.

Furthermore, although the Department of Justice has sought to abate many matters in litigation while the EPA revaluates each rule,[3] several matters identified in Attachment 1 are not abated, including the Cross State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016); *Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.), and Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016); *Texas v. EPA*, 17-60088 (5th Cir.); *Texas v. EPA*, 17-1053, consolidated with *Masias (Sierra Club) v. EPA*, 16-1314 (D.C. Cir.).

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[1] This is the subject of a more comprehensive letter Texas and 18 other states previously addressed. Letter from Hon. Ken Paxton to Hon. Scott Pruitt, Mar. 7, 2017, at https://www.texasattorneygeneral.gov/files/epress/FINAL_Signed_Letter_to_EPA.pdf (also enclosed at Attachment 1).

[2] Because the Court of Appeals for the Fifth Circuit does not mandate the filing of issue statements, those issue statements are not included. Due to the voluminous nature of filed briefs, we refer the agency to the briefs in such cases rather than include them here.

[3] The abatement of litigation is consistent with Executive Order 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017), and Executive Order 13777.

Each of these matters have looming briefing or motion deadlines. Rather than have Texas and other petitioners continue to incur legal expenses and costs to challenge regulations that should be reevaluated, EPA should direct the Department of Justice to abate these matters pending further review of each rule. Any imminent deadlines imposed by those rules should be suspended during agency review.

Abatement of the litigation will allow the EPA time to consider each rule, especially for those rules that form part of a larger, comprehensive framework of unnecessary, overlapping, and duplicative regulation promulgated by the prior administration targeting the same pollutants, goals, and programs of other rulemakings. Particular consideration should be paid to the comprehensive social, economic, and health effects of the entire network of rulemakings and whether rules impose duplicative burdens for negligible net benefits. Abatement will also permit the agency an opportunity to consult with parties in the litigation about revisions to particular rules that might resolve individual grievances.

We appreciate that your agency has many priorities and matters to which to attend and that this request will require substantial deliberation. However, in order to save everyone time and resources, please consider an immediate suspension of any and all active litigation and new regulatory enforcement while the EPA conducts its review and reconsideration of these matters.

We appreciate and thank you for your attention to this matter.

Sincerely yours,

Priscilla M. Hubenak
Chief, Environmental Protection Division
Office of the Attorney General of Texas

Attachments

cc: Ms. Sarah Rees, Director
Office of Regulatory Policy and Management
Office of Policy
Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

ATTACHMENT 1

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2017

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

Re: Request to reexamine delegation of certain environmental regulation authority to the States in accordance with the express terms of the Clean Air and Water Acts; from State of Texas, from State of Alabama, from State of Arizona, from State of Arkansas, from State of Georgia, from State of Indiana, from State of Kansas, from State of Kentucky, from State of Louisiana, from State of Mississippi, from State of Missouri, from State of Montana, from State of Nebraska, from State of Nevada, from State of North Dakota, from State of Oklahoma, from State of South Carolina, from State of West Virginia, from State of Wyoming

Dear Administrator Pruitt:

We write to call your attention to the fact that the extensive regulation from the Environmental Protection Agency during the last decade is directly at odds with the express terms and structure of the Clean Air Act and Clean Water Act. We ask that as you assess the performance of your Agency, you do so with a keen eye toward compliance with these governing laws and not repugnance to them.

These federal laws acknowledge basic truths: that the primary regulators of the environment are the States and local governments. The Clean Air Act wastes no time making this point. The very first section states that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The Clean Air Act then establishes a preferred method for the federal government to assist States and local governments: "to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs." *Id.* § 7401(b)(3). The Act's terms such as "encourage," "assist," and "promote" envision a collaborative arrangement.[1] As one court summarized,

[1] The Clean Water Act is based on a collaborative framework that is substantially similar to the cooperative arrangement underlying the Clear Air Act. *See, e.g.*, 33 U.S.C. § 1251(b) (providing that the policy of the Clear Water Act is to preserve the "primary responsibilities of States to prevent, reduce, and eliminate" water pollution).

"[t]he great flexibility accorded the states under the Clean Air Act is ... illustrated by the sharply contrasting, narrow role to be played by EPA." *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981).

The methods we have seen from the Agency as of late, however, are in direct conflict with the cooperative arrangement the Act establishes. The Agency has replaced "encourage" and "promote" with "command" and "commandeer." Take one recent example. Texas formulated a state implementation plan for Regional Haze. That plan imposed reasonable regulations on such things as power generators in the State to ensure air quality was sufficiently high to allow good visibility. The Agency rejected the State's plan, imposed a federal plan costing $2 billion without achieving any visibility changes, and tried to insulate itself by requiring Texas to challenge the rejection of its plan in the D.C. Circuit.

Unsurprisingly, the Fifth Circuit rejected the Agency's attempt to transfer venue and stayed the federal plan.[2] At that point, the Agency had the opportunity to return to using its authority under the Act—rather than acting on its own. Instead, the Agency imposed a renewed regional haze rule almost as bad as the first.[3] These actions show that the Agency ignored the efforts of the State, perhaps blinded by the belief that good results can only result from top down management by the federal government. Or worse, the prior Administration's agenda and policy goals drove the Agency's decision rather than the requirements of the statute.

The federal government must respect the clear terms of cooperative federal-state enactments. For example, federal agencies may not add conditions on the receipt of federal funds unless the terms are clearly stated in the controlling statute. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). And federal agencies may not stray outside the boundaries of their statutory authority by relying on policy documents and other non-statutory materials. *See, e.g., Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 931 (5th Cir. 2012).

Similarly, the federal government may interpose itself between a State and its municipal subdivisions only if Congress provides a clear directive to do so. *Tennessee v. FEC*, 832 F.3d 597, 610 (6th Cir. 2016). From our perspective, the recent overreach by the Agency amounts to a striking departure from the Clean Air and Clean Water Acts. Respectfully, we ask that you consider the steps that the Agency may take to restore the principles of cooperative federalism embodied in these important statutes.

Sincerely yours,

---

[2] *Texas v. United States Envtl. Prot. Agency*, 829 F.3d 405 (5th Cir. 2016).

[3] 82 Fed. Reg. 3,078 (Jan. 10, 2017)

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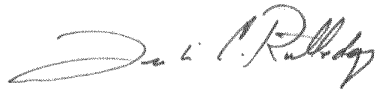
Mark Brnovich
Attorney General of Arizona



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Mike Hunter
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Patrick Morrisey
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Peter Michael
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cc: Hon. Jeff Sessions, United States Attorney General

ATTACHMENT 2

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)	*Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.)	On 12/20/16, the State of Texas filed its petition for review. The case is pending a briefing schedule. DOJ has NOT requested abatement of the case.	No.
Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016)	*Texas v. EPA,* 17-60088 (5th Cir.) *Masias (Sierra Club) v. EPA*, 16-1314 (*Texas v. EPA*, 17-1053) (D.C. Cir.)	On 2/13/17, Texas filed its petitions for review in the 5th Circuit and the D.C. Circuit. Despite this matter affecting only Texas, on 3/24/17, the DOJ filed a motion to dismiss Texas' filing in the 5th Circuit and seeks to transfer the matter to the D.C. Circuit and combine it with a matter filed by the Sierra Club (16-1314). The motion to dismiss/transfer is being briefed. The DOJ has NOT requested abatement of the case, and the parties await a decision from the court.	No.
Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,642 (June 7, 2012)	*Texas v. EPA*, 12-1344, consolidated with *Utility Air Regulatory Group v. EPA,* 12-1342, (D.C. Cir.)	On 8/6/12, the State of Texas filed its petition for review. Final briefs have been filed and the matter is pending oral argument. The DOJ has NOT requested abatement of the case.	No.
[Dis]approval and Promulgation of Air Quality Implementation Plans; Texas; Interstate Transport of Air Pollution for the 2008 Ozone NAAQS, 81 Fed. Reg. 53,284 (Aug. 12, 2016)	*Texas v. EPA*, 16-60670 (5th Cir.)	On 10/11/16, the State of Texas filed its petition for review. On 3/2/17, Texas filed its opening brief. DOJ abatement request pending.	Pending motion.
Protection of Visibility: Amendments to Requirements for State Plans, 82 Fed. Reg. 3078 (Jan. 10, 2017)	*Texas v. EPA*, 17-1021 (D.C. Cir.)	On 1/18/17 (docketed on 1/23/17), the State of Texas filed its petition for review. The case is pending a briefing schedule. DOJ abatement request pending.	Pending motion.

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015)	*Texas v. EPA*, 3:15-cv-00162 (S.D. Tex.); *Texas v. EPA*, 15-60492 (5th Cir.) *In re: EPA Final Rule*, No. 15-3751 (6th Cir.) (consolidated matter includes 15-3853 (Texas) *National Assoc. of Manufacturers v. Dept. of Def., No. 16-299 (U.S.)*	On 6/29/15, Texas filed its complaint challenging the rule in the S.D. Tex. and on 7/16/15 Texas filed a petition for review in the 5th Circuit. The 5th Cir. matter was transferred with others to the 6th Cir. Industrial petitioners brought a jurisdictional question to the Supreme Court, which is pending. The rule has been stayed pending judicial review. A DOJ request to abate the proceeding in the Supreme Court was denied.	No—Court denied, but rule stayed by order of the Court.
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016)	*Texas v. EPA*, 16-1257, consolidated with *North Dakota, v. EPA*, 16-1242 (D.C. Cir.), and further consolidated with *American Petroleum Institute v. EPA*, 13-1108	On 7/28/16, the State of Texas filed its petition for review. The case is pending a briefing schedule. On 4/4/17, the EPA announced it was reconsidering this rule, 82 Fed. Reg. 16331. On 4/7/17, the DOJ requested abatement of the case, which remains pending.	DOJ requested on 4/7/17.
National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015)	*Texas v. EPA*, 15-1494, consolidated with *Murray Energy Corp. v. EPA*, 15-1385 (D.C. Cir.)	On 12/23/15, the State of Texas filed its petition for review. Briefing is complete and oral arguments were scheduled. The DOJ requested abatement of the case, which the Court granted on 4/11/17.	Yes—granted 4/11/17.
State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy, and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 80 Fed. Reg. 33,839 (June, 12, 2015)	*Texas v. EPA*, 15-1308, consolidated with *Walter Coke, Inc., v. EPA*, 15-1166(D.C. Cir.) *Luminant et al. v. EPA*, 15-60424 (5th Cir.) (transferred to D.C. Cir. on 8/31/15)	On 8/31/15, the State of Texas filed its petition for review in the D.C. Circuit and on 7/10/15 in the Fifth Circuit. On 8/31/15, the 5th Circuit matter was transferred and consolidated with the D.C. Circuit proceeding. Briefing is complete and oral arguments were scheduled. The DOJ requested abatement of the case, which the Court granted on 4/24/17.	Yes—granted 4/24/17.

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Supplemental Finding That it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal-and Oil-Fired Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (4/16/12)	*Michigan et al. (Texas) v. EPA*, 16-1204 (6/24/16) (D.C. Cir.), consolidated with 16-1127 (D.C. Cir.)	On 6/24/16, Texas joined Michigan and others in filing a petition for review of the supplemental rule. Briefing is complete. The DOJ requested abatement of the case, which the Court granted on 4/27/17.	Yes—granted 4/27/17.
Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)	*North Dakota et al. (Texas) v. EPA,* 15-1381 (D.C. Cir.) *West Virginia et al. (Texas) v. EPA*, 15-1363 (D.C. Cir.)	On 10/23/15, Texas and others filed a petition for review of each of these rules. Briefing is complete. The DOJ requested abatement of the cases, which the Court granted on 4/28/17.	Yes—granted 4/28/17.

ATTACHMENT 3A

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

Case No. 16-1428

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of the United States Environmental Protection Agency's (EPA) final rule titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS," 81 Fed. Reg. 74,504. (October 26, 2016), a copy of which is enclosed with this filing (Attachment 1).

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1). This petition for review is timely filed within sixty days of the date of publication of the final rule in the Federal Register. *Id.* The final rule is

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Clean Air Act § 307(d)(9), 42 U.S.C. § 7607(d)(9).

Dated: December 19, 2016

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

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First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
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Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, *Respondents*.	}	Case No. _____

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), petitioners the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of the United States Environmental Protection Agency's (EPA) final action titled "Approval and Promulgation of Air Quality Implementation Plans; Texas; Interstate Transport of Air Pollution for the 2008 Ozone National Ambient Air Quality Standards" 81 Fed. Reg. 53,284 (August 12, 2016), a copy of which is enclosed with this filing.

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1). The final action concerns disapproval of a portion of a state implementation plan prepared by Texas pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410, to implement in Texas certain provisions pertaining to the 2008 National Ambient Air Quality Standards. The final action was approved by the Regional

Administrator for EPA Region 6, pursuant to his delegated authority to act for the Administrator. Therefore, the final action is a locally or regionally applicable final action and is not "nationally applicable" or of "nationwide scope or effect." 42 U.S.C. § 7607(b). This petition for review is timely filed within sixty days of the date of publication of the Final Rule in the Federal Register. *Id.*

Dated: October 10, 2016

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
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/s/ Priscilla M. Hubenak
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Counsel for Petitioners

CERTIFICATE OF SERVICE

On October 10, 2016, the foregoing Petition for Review was served by certified mail, return receipt requested, on:

Hon. Regina A. McCarthy
Office of the Administrator (1101A)
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Hon. Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Pursuant to 40 C.F.R. § 23.12:

Correspondence Control Unit
Office of General Counsel (2311A)
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington DC 20460

/s/ Priscilla H. Hubenak
PRISCILLA M. HUBENAK

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

Case No. 17-1021

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of the United States Environmental Protection Agency's (EPA) final rule titled "Protection of Visibility: Amendments to Requirements for State Plans," 82 Fed. Reg. 3,078. (Jan. 10, 2017), a copy of which is enclosed with this filing (Attachment 1).

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1). This petition for review is timely filed within sixty days of the date of publication of the final rule in the Federal Register. *Id.* The final rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Clean Air Act § 307(d)(9), 42 U.S.C. § 7607(d)(9).

Dated: January 18, 2017

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

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BRANTLEY STARR
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JAMES E. DAVIS
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Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Petitioners,

v.

Case No. 17-1053

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CATHERINE McCABE, in her official capacity as Administrator of the United States Environmental Protection Agency,

Respondents.

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas and the Texas Commission on Environmental Quality (collectively, State of Texas) petition the Court for review of the United States Environmental Protection Agency's (EPA) final action entitled "Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS)," 81 Fed. Reg. 89,870 (Dec. 13, 2016), a copy of which is enclosed with this filing (Attachment 1).

Jurisdiction and venue for this petition is proper in the Fifth Circuit Court of Appeals because the Final Rule is a "locally or regionally applicable" final action of the EPA Administrator. *See* 42 U.S.C. § 7607(b). The State of Texas has accordingly filed a petition for review in the Fifth Circuit to challenge the rule. Because EPA has taken the position that the rule is of "nationwide scope and effect, 81 Fed. Reg. at 89875-76, and may argue that jurisdiction and venue are proper only in this Court, the State of Texas files this petition for review in this Court as a protective matter to preserve their right to judicial review.

Respectfully submitted,

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BRANTLEY STARR
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CATHERINE McCABE, in her official capacity as Administrator of the United States Environmental Protection Agency,

Respondents.

Case No. _____

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas and the Texas Commission on Environmental Quality (collectively, State of Texas) petition the Court for review of the United States Environmental Protection Agency's (EPA) final action entitled "Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS)," 81 Fed. Reg. 89,870 (Dec. 13, 2016), a copy of which is enclosed with this filing (Attachment 1).

Jurisdiction and venue for this petition is proper in this Court under 42 U.S.C. § 7607(b). The Final Rule establishes air quality designations for four areas in the State of Texas for the SO_2 NAAQS. Therefore, the Final Rule is a locally or regionally applicable final action of the EPA Administrator and is not "nationally applicable" or "of nationwide scope or effect." 42 U.S.C. § 7607(b). This petition for review is timely filed within sixty days of the date of publication of the Final Rule in the Federal Register. *Id.*

Respectfully submitted,

KEN PAXTON
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS
and
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
Petitioner

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent

Case No. 12-1344

PETITION FOR REVIEW

Pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the State of Texas and Texas Commission on Environmental Quality hereby petition the court for review of the United State Environmental Protection Agency's final rule published in the Federal Register at 77 Fed. Reg. 33642 on June 7, 2012, titled "Regional Haze: Revisions to Provisions Governing Alternatives to Source-specific Best Available Retrofit Technology (BART) Determinations, Limited SIP disapprovals, and Federal Implementation Plans."

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 3, 2012, I served a copy of the foregoing *Petition for Review* by certified mail, return receipt requested, on the following parties of interest:

The Honorable Lisa Jackson
U.S. EPA
Office of the Administrator
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Washington, D.C. 20450
Via: CMRRR #7007 1490 0000 0796 0305

Correspondence Control Unit
Office of General Counsel (2311)
U.S. EPA
1200 Pennsylvania Ave N.W.
Room 4000
Washington, D.C. 20460
Via: CMRRR #7007 1490 0000 0796 0299

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

STATE OF TEXAS,

Texas Department of Agriculture,
Texas Commission on Environmental Quality,
Texas Department of Transportation,
Texas General Land Office,
Railroad Commission of Texas,
Texas Water Development Board,

STATE OF LOUISIANA, and

STATE OF MISSISSIPPI,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA McCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works).

Defendants.

Case No. _____

COMPLAINT AND PETITION FOR REVIEW

TO THE HONORABLE UNITED STATES DISTRICT COURT:

1. This is a challenge to the legality of the final ru le titled "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated on June 29, 2015, by defendants United States Environmental Protection Agency; and the Uni ted States Army Corps of Engineers ("Federal Agencies"). Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg.

37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("Final Rule").

2. The Final Rule is an unconstitutional and impermissible expansion of federal power over the states and their citizens and property owners. Whereas Congress defined the limits of its commerce power through the Clean Water Act to protect the quality of American waters, the Environmental Protection Agency and Army Corps of Engineers, through the Final Rule, are attempting to expand their authority to regulate water and land use by the states and their citizens. The success of protecting and improving the quality of American waters has come through the cooperative work of the states and the federal government. That success is threatened when administrative agencies attempt to substitute their judgment for decisions by Congress, the courts, and the states. Moreover, the very structure of the Constitution, and therefore liberty itself, is threatened when administrative agencies attempt toassert independent sovereignty and lawmaking authority that is superior to the states, Congress, and the courts.

3. The challenge is brought by the State of Texas, by and through its Attorney General, Ken Paxton, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board. The challenge is also brought by the State of Louisiana, by and through its Attorney General, Buddy Caldwell, and the State of Mississippi, by and through its Attorney General, Jim Hood.

4. The Final Rule amends the definition of "Waters of the United States" under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* ("Clean Water Act" or "CWA"). A true and correct copy of the Final Rule is attached hereto at Exhibit A.

5. The Final Rule violates the Clean Water Act, the Administrative Procedure Act, and the United States Constitution, as noted below. Plaintiffs ask this Court to vacate the Final Rule, to enjoin the Federal Agencies from enforcing the Final Rule, and for any other relief as this Court deems proper.

I. PARTIES

6. Plaintiffs are the State of Texas, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board; the State of Louisiana; and the State of Mississippi.

7. The State of Texas and its state agencies, by and through its Attorney General, bring this suit to assert the rights of the state and also on behalf of its citizens.[1]

8. The State of Louisiana, by and through its Attorney General, James D. "Buddy" Caldwell, brings this suit pursuant to authority vested in its Attorney General to "institute, prosecute, or intervene in any civil action or proceeding" as "necessary for the assertion or protection of any right or interest of the state." La. Const. Art. IV, Sec. 8. The State of Louisiana also brings this action as *parens patriae* for all Louisiana residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

9. The State of Mississippi, by and through its Attorney General, Jim Hood, brings this suit pursuant to authority vested in its Attorney General "to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest" and "intervene and argue the constitutionality of any statute when notified of a challenge thereto." 7 Miss. Code § 7-5-1. The

[1] *See* Tex. Const. Art. 4, § 22; Tex. Gov't Code, Ch. 402; *see also* Tex H.B. 1, Art. IX, § 16.01, 82nd Tex. Leg., R.S. (2011).

State of Mississippi also brings this action as *parens patriae* for all Mississippi residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

10. Defendant United States Environmental Protection Agency ("EPA") is a federal agency within the meaning of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 551(1). Pursuant to the Clean Water Act, the EPA is provided with the authority, *inter alia*, to administer pollution control programs over navigable waters.

11. Defendant the Honorable Gina McCarthy is Administrator of the EPA and a signatory of the Final Rule.

12. Defendant United States Army Corps of Engineers ("Corps") is a federal agency within the meaning of the APA. *See* 5 U.S.C. § 551(1). The Corps, *inter alia*, administers the Clean Water Act's Section 404 program, regulating the discharge of dredged or fill material in navigable waters.

13. Defendant the Honorable Jo-Ellen Darcy is Assistant Secretary of the Army (Civil Works) and a signatory of the Final Rule.

II. JURISDICTION AND VENUE

14. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 (federal question), 2202 (further necessary relief), and 5 U.S.C. §§ 701–706 (APA). There is a present and actual controversy between the parties, and Plaintiffs are challenging a final agency action pursuant to 5 U.S.C. §§ 551(13), and 704. The Court may issue further necessary relief pursuant to 28 U.S.C. § 2202, 5 U.S.C. §§ 706(1), 706(2)(A) and (C), as well as pursuant to its general equitable powers.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C), because (1) Defendants are either (a) agencies or instrumentalities of the United States or (b) officers or employees of the United States, acting in their official capacities; (2) Plaintiff State of Texas and its agencies are residents of the Southern District of Texas;[2] and (3) no real property is involved in this action.

16. Because there may be a dispute between the parties as to whether original jurisdiction to review the Final Rule lies in this Court, pursuant to 28 U.S.C. § 1331, or in the U.S. Court of Appeals for the Fifth Circuit, pursuant to 33 U.S.C. § 1369(b)(1), and because the deadline for a circuit court petition for review of this agency action is only 120 days, *id.*, Plaintiffs have—out of an abundance of caution—filed a petition in the U.S. Court of Appeals for the Fifth Circuit, to challenge the Final Rule on similar grounds as those asserted herein. Such "dual filing" is common and prudent when jurisdiction may be disputed, and "careful lawyers must apply for judicial review [in the court of appeals] of anything even remotely resembling" an action reviewable under section 509(b)(1), *see Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989), even when they believe that jurisdiction may lie elsewhere. *See Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 554 (2nd Cir. 1978) (complaint filed in district court and petition filed in circuit court "as a precaution").

III. BACKGROUND

A. The Clean Water Act Maintains the States' Regulatory Authority Over Land and Water

17. When Congress enacted the Clean Water Act Amendments of 1972, it made abundantly clear its goal to grant primary regulatory authority over land and waters to the States:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water

[2] *See Delaware v. Bender*, 370 F. Supp. 1193, 1200 (D. Del. 1974).

> resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

18. The Clean Water Act does, however, grant limited authority to the Federal Agencies to regulate the discharge of certain materials into "navigable waters." *See, e.g.*, 33 U.S.C. § 1251(a), 1342(a), 1344(a).

19. Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

20. The meaning of "the waters of the United States" is significant, because it establishes, among other things, the waters for which the Federal Agencies can require Water Quality Standards ("WQS") and Total Maximum Daily Loads ("TMDLs"); the waters for which the Federal Agencies can administer permitting programs like the National Pollutant Discharge Elimination System ("NPDES") and section 404 dredge or fill permitting programs; and the waters for which the Federal Agencies can require state certifications for any discharge activity.

21. Obtaining a discharge permit is an expensive and uncertain endeavor that can take years of processing and cost hundreds of thousands of dollars. *See* U.S.C. §§ 1342, 1344. But discharging into a "water of the United States" without a permit can subject any person to civil penalties of up to $37,500 per violation, per day, as well as criminal penalties. *See Hanousek v. United States*, 528 U.S. 1102, 1103 (2000); *see also* 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

22. In general, a broader definition of "the waters of the United States" will place more waters under federal authority. On the other hand, a more limited definition of "the waters of the United States" will place more waters under state and local authority. Therefore, the meaning of "the waters of the United States" is significant because it defines the parameters of cooperative

federalism under the Clean Water Act and determines whether Congress's wish "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" will be honored. 33 U.S.C. § 1251(b).

B. The Meaning of "the Waters of the United States"

23. More than 100 years before the passage of the Clean Water Act Amendments of 1972, the Supreme Court defined the phrase "navigable waters of the United States" as "navigable in fact" interstate waters. *The Daniel Ball*, 10 Wall. 557, 563 (1871).

24. In 1974, the Corps issued a rule defining "navigable waters" as those waters that have been, are, or may be used for interstate or foreign commerce. 33 C.F.R. § 209.120(d)(1) (1974).

25. In 1986, the Corps issued another rulemaking, expanding its jurisdiction to include traditional navigable waters, tributaries of those waters, wetlands adjacent to those waters and tributaries, and waters used as habitat by migratory birds that either are protected by treaty or cross state lines. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

26. From 1986 to 2015, the regulatory definition of "the waters of the United States" remained unchanged. *See* 33 C.F.R. 328 (1986). Markedly, during that time, the only development of the definition was in the judicial branch, where the Supreme Court took an increasingly narrow interpretation of what constitutes "the waters of the United States." *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

i. *Riverside Bayview*

27. The Supreme Court first addressed the proper interp retation of "the waters of the United States" under the Clean Water Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

28. *Riverside Bayview* concerned a wetland that "was adjacent to a body o f navigable water," because "the area characterized by saturate d soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway." *Id.* at 131.

29. The Supreme Court upheld the Corps' interpretation of "the waters of the United States" to include wetlands that "actually abut[ted]" on traditional navigable waters, finding that "the Corps must necessarily choose some point at wh ich water ends and land begins." *Id.* at 132.

ii. *SWANCC*

30. Fifteen years later, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*"), the Supreme Court rejected the Corps' assertion of jurisdiction over any waters "[w]hich are or would be used as habitat' by migratory birds. 531 U.S. 159, 164 (2001) (quoting 51 Fed. Reg. 41,217 (1986)). The Court held that the Clean Water Act cannot be read to confer jurisdiction over physically isolated, wholl y intrastate waters. *Id.* at 168. The Court found that "[i]n order to rule for respondents here, we w ould have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the t ext of the statute will not allow this." *Id.*

31. Observing that "[i]t was the *significant nexus* between the wetlands and the 'navigable waters' that informed [the Court's] read ing of the CWA in *Riverside Bayview*," the Court held that *Riverside Bayview* did not establish that federal jurisdiction "extends to ponds that are not adjacent to open water." *Id.* (emphasis added).

32. In *SWANCC*, the Court reiterated its holding in *Riverside Bayview* that federal jurisdiction extends to wetlands that actually abut navigable waters, because protection of these adjacent, actually-abutting wetlands was consistent with congressional intent to regulate wetlands that are "inseparably bound up with 'waters of the United States.'" *Id.* at 172 (quoting *Riverside Bayview*, 474 U.S. at 134).

iii. *Rapanos*

33. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court again rejected the Corps' assertion of expanded authority over non-navigable, intrastate waters that are not significantly connected to navigable, interstate waters. The Court emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." *Rapanos* raised the question of whether wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters" are "waters of the United States." *Rapanos*, 547 U.S. at 729. The court of appeals held they were, but the Supreme Court held that they were not. *Id.* at 716–17. The Court's majority consisted of two opinions, both of which rejected the Corps' assertion of jurisdiction.

34. Citing the ordinary meaning of "the waters of the United States," the four-justice plurality held that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water," such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features." *Id.* at 732–33 (internal quotation marks omitted). The plurality found that in going beyond this "commonsense understanding" and classifying waters like "ephemeral streams," "wet meadows," "man-made drainage ditches" and "dry arroyos in the middle of the desert" as "waters of the United States," the Corps had stretched the statutory text "beyond parody." *Id.* at 734 (internal quotation marks omitted). The plurality also rejected the view that

wetlands adjacent to ditches, when those ditches do not meet the definition of "waters of the United States," may nevertheless be subjected to federal regulation on the theory that they are "adjacent to" the remote "navigable waters" into which the ditches ultimately drain. *Id.* at 739–40.

35. Justice Kennedy concurred in the judgment, but noted that both the plurality and the dissent would expand CWA jurisdiction beyond permissible limits. He wrote that the plurality's coverage of "remote" wetlands with a surface connection to small streams would "permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach" (i.e., wetlands near to, but lacking a continuous surface connection with, navigable-in-fact waters). *Id.* at 776–77 (Kennedy, J., concurring in the judgment). This, he said, was "inconsistent with the Act's text, structure, and purpose." *Id.* at 776 (Kennedy, J., concurring in the judgment). As for the dissent, Justice Kennedy said the Act "does not extend so far" as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778–79 (Kennedy, J., concurring in the judgment). As a result, Justice Kennedy rejected both sides' jurisdictional theories, refuting tests that rely on mere hydrologic connections to, and mere proximity to, navigable waters or features that drain into them.

36. Justice Kennedy employed a different test. In his view, the Corps may deem a water or wetland "a 'navigable water' under the Act" if it has a "significant nexus" to a traditional navigable water. *Id.* at 767 (Kennedy, J., concurring in the judgment). For "wetlands adjacent to navigable-in-fact waters," Justice Kennedy thought there is a "reasonable inference of ecologic interconnection" that is sufficient to sustain the Corps' "assertion of jurisdiction for those wetlands . . . by showing adjacency alone." *Id.* at 780 (Kennedy, J., concurring in the judgment). Justice Kennedy also said the Corps "may choose to identify categories of tributaries that, due to their

volume of flow (either annually or on average), the ir proximity to navigable waters, or other relevant considerations, are significant enough tha t wetlands adjacent to them are likely . . . to perform important functions for an aquatic system i ncorporating navigable waters." *Id.* at 781 (Kennedy, J., concurring in the judgment). But the Federal Agencies' regulations, which allow "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," were so broad that they could not be "the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity" of traditional navigable waters. *Id.* "Indeed, in many cases wetlands adjacent to tribu taries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781–82 (Kennedy, J., concurring in the judgment). Given the over-breadth of the regula tions, Justice Kennedy concluded that the Corps "must establish a significant nexus on a case -by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." *Id.* at 782 (Kennedy, J., concurring in the judgment).

37. Neither the plurality opinion nor Justice Kennedy's opinion in *Rapanos* repudiated any aspect of the *SWANCC* or *Riverside Bayview* decisions.

C. Despite Contrary Precedent, the Federal Agenci es Redefine "Waters of the United States" to Expand Clean Water Act Jurisdiction

38. On April 21, 2014, the Federal Agencies published f or comment "Definition of 'Waters of the United States' Under the Clean Water Act." *See* 79 Fed. Reg. 22,188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 32 8 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("Proposed Rule").

39. The stated purpose for the rulemaking is to "defin[e] the scope of waters protected under the [CWA], in light of the statute, science, Supreme Court decisions . . . and the agencies'

technical expertise." Final Rule at 37,054. The Federal Agencies assert that the rule will "increase CWA program predictability and consistency by clari fying the scope of "waters of the United States" protected under the Act." *Id.*

40. On May 27, 2015, Administrator McCarthy and Assista nt Secretary Darcy took final agency action when they signed the Final Rule.

41. On June 29, 2015, the Final Rule was published in the Federal Register. This Rule amends 33 C.F.R. § 328 as well as 40 C.F.R. §§ 110, 112 116, 117, 122, 230, 232, 300, 302, and 401, to be effective as of August 28, 2015. Accordi ngly, the Federal Agencies' promulgation of the Final Rule is now ripe for judicial review.

i. The Final Rule Maintains *Per se* Federal Jurisdiction Over Certain Waters

42. The Final Rule reasserts that traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictiona l waters are jurisdictional by rule. 33 C.F.R. § 328.3(a)(1)-(4) (2015).[3]

43. Plaintiffs do not dispute that these waters have traditionally been jurisdictional. For purposes of clarity, these waters will be referred to as "traditional waters".

ii. The Federal Agencies Broadly Define "Tributarie s" and Claim *Per se* Jurisdiction over All "Tributaries" of Traditional Waters

44. The Final Rule asserts that all "tributaries" of al traditional waters are jurisdictional by rule. *See id.* § 328.3(a)(5).

45. Furthermore, the Final Rule defines "tributary" for the first time as "a water that contributes flow, either directly or through anothe r water" to a traditional water and "is

[3] The Final Rule amends the definition of "the water s of the United States" under 33 C.F.R. § 328, as w ell as 40 C.F.R. §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. For simplicity, Plaintiffs will only cite to 33 C.F.R. § 328, but Plaintiffs' arguments apply to all C.F.R. sections amended under the Final Rule.

characterized by the presence of the physical indic ators of a bed and bank and an ordinary high water mark." *Id.* § 328.3(c)(3).

46. Under the Final Rule, a tributary can be "natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches . . . ." *Id.* A water does not lose its classification as a tributary—even when it has man- made or natural breaks, no matter the length—"so long as a bed and banks and ordinary high watermark can be identified upstream of the break." *Id.*

47. "Ordinary high water mark" is defined as "that line on the shore established by the fluctuations of water and indicated by physical cha racteristics such as a clear, natural line impressed on the bank, shelving, changes in the cha racter of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means." *Id.* § 328.3(c)(6).

48. The Final Rule fails to account for frequency and d uration of flow, meaning the Federal Agencies can assert jurisdiction over "trib utaries" in the forms of dry ponds, ephemeral streams, intermittent channels, and even ditches—as long as the Federal Agencies can find a bed and banks and the existence, at some point in history, of an ordinary high water mark.

49. Despite championing Justice Kennedy's concurrence i n *Rapanos* throughout the Final Rule, the Federal Agencies ignore Justice Ken nedy's admonishment concerning the use of the "ordinary high water mark" as a determinative m easure for tributaries. Justice Kennedy stated that "the breadth of the standard—which seems to le ave wide room for regulation of drains, ditches, and streams remote from any navigable-in-f act water and carrying only minor water volumes toward it—precludes its adoption as the det erminative measure . . . ." *Rapanos*, 547 U.S.

at 782 (Kennedy, J., concurring in the judgment). [4] Not only do the Federal Agencies adopt the "ordinary high water mark" as a determinative measure for tributaries in the Final Rule—they greatly expand it from the Proposed Rule. The Proposed Rule required "the *presence* of a bed and banks and ordinary high water mark," *see* Proposed Rule at 22,199, while the Final Rule requires the "presence of *physical indicators* of a bed and banks and ordinary high water mark." 33 C.F.R. § 328.3(c)(3) (2015) (emphasis added).

50. Assuming, *arguendo*, that Justice Kennedy intended the "significant nexus" test in *Rapanos* to be stretched to tributaries, the Final Rule would fail that test, because it places all tributaries of traditional waters under the Federal Agencies' authority without regard to the tributaries' actual impact on the "chemical, physical, and biological integrity of" any traditional waters. *See Rapanos*, 547 U.S. at 717. Under the Final Rule, a tributary that only has a small, infrequent, and historically-traceable flow into a traditional water, is nevertheless within the Federal Agencies' jurisdiction. 33 C.F.R. § 328.3(c)(3) (2015).

51. The Final Rule's inclusion of tributaries also violates the plurality's opinion in *Rapanos* because the definition includes a feature with any flow into a traditional water, even if that flow does not constitute a "continuous surface connection." *Rapanos*, 547 U.S. at 742.

iii. The Federal Agencies Broadly Define "Significant Nexus" and Claim *Per se* Federal Jurisdiction Over Certain Waters They Deem to Have a "Significant Nexus" to Traditional Waters

52. For the purpose of determining whether or not a water has a "significant nexus," the Final Rule requires that the water's effect on a downstream traditional water be assessed by evaluating the following functions: (i) sediment trapping; (ii) nutrient recycling; (iii) pollutant

[4] The Federal Agencies contradict Justice Kennedy even further by explicitly including "ditches" in the regulatory definition of "tributary." *Compare* 33 C.F.R. § 328.3(a)(5), *with Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

trapping, transformation, filtering, and transport; (iv) retention and attenuation of flood waters; (v) runoff storage; (vi) contribution of flow; (vii) export of organic matter; (viii) export of food resources; and (ix) provision of life-cycle-dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditional navigable water, interstate water, and/or territorial sea. 33 C.F.R. § 328.3(c)(5) (2015).

53. Under the Final Rule, a water has a "significant nexus" "when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *Id.* This definition exceeds Clean Water Act authority under *SWANCC* and *Rapanos*. In *SWANCC*, the Court refused the federal government's assertion of jurisdictional authority over an isolated, intrastate water because of the Migratory Bird Rule. *See SWANCC*, 531 U.S. at 168. Under the Final Rule's framework, the Federal Agencies have effectively reasserted the theory previously rejected in *SWANCC*—that the federal government can assert jurisdiction when, for example, the nesting of migratory birds, "alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *See* 33 C.F.R. § 328.3(c)(5)(ix) (2015).

iv. The Federal Agencies Broadly Define "Adjacent Waters" and Claim *Per se* Jurisdiction Over All Adjacent Waters

54. The next category of waters deemed automatically jurisdictional by the Final Rule are all waters that are "adjacent" to traditional waters, impoundments, or tributaries. *See id.* § 328.3(a)(5). But in claiming *per se* jurisdiction over all "neighboring" waters—whether or not

there is a significant nexus and whether or not there is a continuous surface connection—the Final Rule goes beyond the authority of the Clean Water Act and the opinions in *Rapanos*.

55. "Adjacent waters" are waters "bordering, contiguous or neighboring" traditional waters, impoundments, or tributaries. *Id.* at § 328.3(c)(1). The category includes "wetlands, ponds, lakes, oxbows, impoundments, and similar water features," as well as "waters separated by constructed dikes or barriers, natural river berms, beach dunes." *Id.* at § 328.3(a)(5).

56. "Neighboring" is defined as "(1) [w]aters located in whole or part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary; . . .(2) [w]aters located in whole or part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, theterritorial seas, an impoundment of a jurisdictional water, or a tributary; . . . or (3) [w]aters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas." *Id.* at § 328.3(c)(2).

57. Even when a water does not meet the criteria of "neighboring," it can still be jurisdictional as an "adjacent water" through a case-by-case significant-nexus analysis as proposed under the Final Rule. *See id.* at § 328.3(a)(7)–(8).

58. From a legal standpoint, the Final Rule's coverage of all "adjacent waters" fails both Justice Kennedy's and the plurality's tests under *Rapanos*.

59. The Final Rule's coverage of all "adjacent waters" is inconsistent with Justice Kennedy's approach because, among other things, it grants *per se* jurisdiction to waters that have no "significant nexus" to traditional waters of the United States. Instead, the Final Rule will establish federal jurisdiction over water features never contemplated under *SWANCC* or *Rapanos* by virtue of simply being near—not connected to—traditional waters of the United States. *See*

Rapanos, 547 U.S. at 779 (Kennedy, J., concurring in the j udgment). The Final Rule's coverage of all "adjacent waters" is inconsistent with the p lurality's test because, among other things, it grants *per se* jurisdiction to waters that have no "continuous su rface connection" to traditional waters of the United States. *Id.* at 772 (Kennedy, J., concurring in the judgment).

60. From a practical standpoint, the Final Rule's defin ition of "adjacent waters" does nothing to further the Federal Agencies' express go al to "clarify the scope of waters protected under the CWA." For a landowner, including a state, to determine whether a particular water feature is subject to the Federal Agencies' jurisdi ction (and, therefore, subject to permitting requirements under the CWA), the landowner would be forced to perform ~~or~~, more likely, pay an expert to perform ~~the~~ following analysis:

Step 1

Landowner must determine the location of the ordinary high water mark of the nearest traditional navigable water, interstate wat er, territorial sea, impoundment of a jurisdictional water, or tributary , as defined by the Final Rule;

⇩

Step 2

Landowner must determine whether any part of the fe ature at issue is within 100 feet of the ordinary high water mark *or* within 1,500 feet of the high tide line. If so, then the *entire water feature* is subject to federal jurisdiction. If not, the landowner can proceed to step 3;

⇩

Step 3

Landowner must determine where the 100-year floodpl ain is located [5] and whether any part of the feature at issue is within the 100-year floodplain of a traditional navigable water, interstate water, terr itorial sea, impoundment of a

[5] This may be a difficult task. When discussing their reliance on the 100-year floodplain in the preamble to the Final Rule, the Federal Agencies acknowledge that "much o f the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground. The agencies will determine if a particular map is no longer accurate based on factors, such as streams or rivers moving out of their channels with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is deemed by the agencies to be out of date, the agencies will rely on other available tools to identify the 100-year floodplain . . . ." Final Rule at 37,081.

jurisdictional water, or tributary, as defined by the Final Rule. If so, proceed to Step 4. If not, proceed to Step 5.

Step 4

Landowner must determine whether any part of the feature at issue is within 1,500 feet of the ordinary high water mark of the water found in Step 3. If so, then the entire feature at issue is subject to federal jurisdiction. If not, Landowner must proceed to Step 5.

Step 5

Landowner must determine whether any part of the feature at issue is within 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule. If so, proceed to Step 6. If not, still proceed to Step 6.

Step 6

If any part of the feature at issue is within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea *or* within 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule, Landowner must then have a case-by-case significant nexus analysis performed on the feature at issue and the relevant water.

Step 7

If the Federal Agencies determine that the feature at issue has a significant nexus to the relevant traditional navigable water,interstate water, territorial sea, impoundment, or tributary, the feature is subject to federal jurisdiction. If the Federal Agencies determine that the feature does not have a significant nexus to the relevant traditional navigable water, interstate water, territorial sea, impoundment, or tributary, the feature at issue is not subject to federal jurisdiction.

61. It is unrealistic for the Federal Agencies to expect that landowners will possess the expertise, patience, and resources to employ this onerous test to determine whether their land can fall under the Final Rule's definition of "adjacent waters." Nor should states and their taxpayers

be forced to spend funds for such onerous jurisdictional determinations. Moreover, it is unrealistic for the Federal Agencies to expect that such a complicated standard can be applied predictably and consistently across the nation.

62. In addition to exceeding practicality and Supreme Court precedent, the Federal Agencies' promulgation of the broad definition of "adjacent waters" violates notice requirements under the APA.

63. The APA requires agencies to provide a "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ." 5 U.S.C. §§ 553(b)–(c). This includes the requirement that an agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule as originally proposed. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). And a final rule is a logical outgrowth of a proposed rule only to the extent that interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

64. In both the Proposed Rule and the Final Rule, waters that are "adjacent" to traditional waters, and tributaries and impoundments of traditional waters, are themselves "waters of the United States." And, in both the proposed and final rules, "adjacent waters" include "neighboring waters." *See* Proposed Rule at 22,260; *see also* 33 C.F.R. § 328.3(a)(5) (2015).

65. In the Proposed Rule, however, neighboring waters were defined in terms of a hydrological connection. Specifically, "neighboring waters" were "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a

jurisdictional water." *See* Proposed Rule at 22,261, 22,271. Further, a "riparian area" was defined as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." *Id.* In the Proposed Rule, the Federal Agencies' justification for regulating "adjacent waters" was based on what it deemed to be their "significant nexus"—as that term was used by Justice Kennedy—to traditional waters in that such adjacent waters "significantly affect the chemical, physical, and biological integrity of those waters." *Id.* at 22,260.

66. In the Final Rule, "riparian" is nowhere to be found, and the only reference to subsurface hydrology is in the exceptions to federal jurisdiction. 33 C.F.R. § 328.3(b)(5) (2015). Instead, the Final Rule defines "neighboring waters" exclusively in terms of distance—not hydrological connection—to traditional waters, impoundments, and tributaries. *See id.* § 328.3(c)(2).

67. There was no reason for Plaintiffs to anticipate a change in the definition of "adjacent" waters from hydrological connection to distance alone, especially because the latter is wholly without support in either the plurality opinion or Justice Kennedy's concurrence in *Rapanos*. Accordingly, the Final Rule's definition of "adjacent" waters is not a logical outgrowth of the Proposed Rule.

68. This sweeping inclusion of "adjacent" waters exceeds the Federal Agencies' authority under the Clean Water Act, violates the APA, and goes beyond the precedent established in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

v. The Final Rule Establishes Two Categories of "Waters" that Will Be Evaluated on a Broad Case-by-Case Basis

69. Under the Final Rule, two categories of waters will be subjected to a case-by-case "significant nexus" analysis. The first category, referred to as "a(7) waters," identifies five specific

subcategories of "waters" that will be subject to c ase-by-case determinations. 33 C.F.R. § 328.3(a)(7) (2015). These include prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wet lands. *Id.* These "a(7) waters" are deemed jurisdictional when they are determined on a case-specific basis to have a "significant nexus" to a traditional navigable water, interstate water, or territorial sea. *Id.* The Final Rule further states that "a(7) waters" that lie within the same watershed ar e "similarly situated" by rule and, therefore, will be aggregated for purposes of the Federal Agen cies' significant nexus analysis. *Id.* § 328.3(c)(5).

70. The second category, referred to as "a(8) waters" a re "[a]ll waters located within the 100-year floodplain of a [traditional water] and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a [traditi onal water, tributary, or adjacent water]." *Id.* § 328.3(a)(8). These "a(8) waters" are deemed jurisdi ctional when they are determined on a case-specific basis to have a "significant nexus" to a traditional water. *Id.* Moreover, if only a "portion" of an "a(8) water" is determined to have a "signifi cant nexus" to a traditional water, the entire "a(8) water" is subject to CWA jurisdiction. *Id.*

71. Significantly, the Federal Agencies acknowledge in their own economic analysis of the Final Rule that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water , interstate water, or territorial sea" and that th e 100-year floodplain encompasses an even larger area.[6] Therefore, the Federal Agencies admit that the Final Rule will expose more than "the vast majo rity of the nation's water features" to the possibility of CWA jurisdiction.

[6] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 11, http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

72. This case-by-case, aggregating approach exceeds the Federal Agencies' authority under the Clean Water Act and goes beyond the precedent established in *SWANCC* and *Rapanos*.

vi. The Federal Agencies' Reliance on the "Significant Nexus" Standard Is Flawed, As Is Their Application of the Standard

73. In the preamble to the Final Rule, the Federal Agencies make clear that "[a]n important element of the agencies' interpretation of the CWA is the significant nexus standard . . . first informed by the ecological and hydrological connections the Supreme Court noted in *Riverside Bayview*, developed and established by the Supreme Court in *SWANCC*, and further refined in Justice Kennedy's opinion in *Rapanos*." Final Rule at 37,056.

74. In developing its "significant nexus" standard, however, the Final Rule relies almost exclusively on Justice Kennedy's concurrence in *Rapanos*. This reliance is misplaced. While the Federal Agencies will undoubtedly argue that relying on Justice Kennedy's concurrence is proper in a fractured opinion such as this, that opinion does not grant the Federal Agencies permission to exceed their authority under the Clean Water Act and the Constitution. Even Justice Kennedy acknowledged in *Rapanos* that "[t]o be sure, the significant-nexus requirement may not align perfectly with the traditional extent of federal authority." *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

75. The Federal Agencies would have been more prudent to rely on the *Rapanos* plurality's holding that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.' *Rapanos*, 547 U.S. at 739 (quoting Webster's New Int'l Dictionary 2882 (2d ed. 1954)). That standard is more expressly consistent with the goals of the Clean Water Act, *see* 33 U.S.C. §§ 1251(a)–(b), Congress's commerce power, and the underlying precedent in *Riverside Bayview* and *SWANCC*.

76. Instead, the Final Rule relies almost exclusively o n a "significant nexus" standard that goes far beyond what was contemplated by Justi ce Kennedy in *Rapanos* and eclipses any authority under *Riverside Bayview* and *SWANCC*.

77. In *Riverside Bayview*, the Supreme Court stated that "the waters of the United States" under the Clean Water Act referred primaril y to "rivers, streams, and other hydrographic features more conveniently identifiable as 'waters. '" 474 U.S. at 131. Nowhere did *Riverside Bayview* suggest that "the waters of the United States" sho uld include anything beyond that.

78. In *SWANCC*, the Supreme Court reiterated its holding in *Riverside Bayview* that wetlands that were "inseparably bound" up with traditional navigable waters constituted waters of the United States. *SWANCC*, 531 U.S. at 172. In clarifying its holding in *Riverside Bayview*, the *SWANCC* Court stated the "inseparability" between a wetlan d that *actually abutted* a traditional navigable water produced a "significant nexus" that guided the court's previous decision. *Id.* at 168 (emphasis added). *SWANCC* stated that under the Federal Agencies' concept of jurisdiction, the court would have to hold that the Clean Water A ct extends to waters that are not adjacent to open water, and "that the text of the statute will not allow this." *Id.* Therefore, nothing in either *Riverside Bayview* or *SWANCC* suggests that the concept of a "significant nexus" justifies CWA jurisdiction over anything beyond wetlands that *actually abut* traditional navigable waters.

79. Finally, in *Rapanos*, while Justice Kennedy further developed the "sign ificant nexus" concept, he maintained that the standard rem ained rooted in *Riverside Bayview*, where the court held that wetlands actually abutting navigabl e waters were jurisdictional because they are "integral parts of the aquatic environment" that Co ngress expressly chose to regulate. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the jud gment) (quoting *Riverside Bayview*, 474 U.S. at 135).

80. The Federal Agencies' almost exclusive reliance on a "significant nexus" standard does not provide a valid legal justification for the overly expansive definition of "the waters of the United States" in the Final Rule. The Final Rule still must comply with the Clean Water Act, the Constitution, and guiding precedent. It does not. On the contrary, the Final Rule attempts to confer federal jurisdiction to waters that were not contemplated as jurisdictional under any reasonable reading of *Rapanos*, *SWANCC*, and *Riverside Bayview*. Moreover, it is noteworthy that Justice Kennedy's concern was that both the majority- and minority-plurality opinions would expand CWA jurisdiction beyond permissible limits, *see Rapanos*, 547 U.S. at 776–77 (Kennedy, J., concurring in the judgment), thereby reinforcing Plaintiffs' position that the Federal Agencies are not properly relying on Justice Kennedy's "significant nexus" standard.

vii. The Final Rule Establishes Exclusions that Lack Certainty and Will Require Case-Specific Determinations

81. In broadly defining a number of new terms, the Federal Agencies have not only riddled the CWA with uncertain and unpredictable standards, but they have also made unclear which waters they explicitly intend to exclude from CWA jurisdiction.

82. The Final Rule excludes a list of seven types of water features, each of which contains limiting qualifications. Specifically, many of the exclusions only qualify if they "do not meet the definition of tributary," *see* 33 C.F.R. § 328.3(b)(4)(vi); "are not a relocated tributary or excavated in a tributary," *see id.* at § 328.3(b)(3)(i)–(ii); and are water features that were "created in dry land," *see id.* at §§ 328.3(b)(4)(i)–(v) and 328.3(b)(4)(vii).

83. As shown above, the Final Rule's definition of "tributary" is overbroad and in conflict with Justice Kennedy's concurrence in *Rapanos*. This will establish federal jurisdiction over waters—and lands—whose only defining characteristics are that they possess an historic "ordinary high water mark" and in some way "contribute flow."

84. Furthermore, the Federal Agencies do not define "dry land," nor do they state what "created in dry land" means. As a result, prudent p roperty owners, including the states, will not know whether certain water features meet these excl usions unless they expend significant resources to have the proper analyses performed all in an effort to prove to the Federal Agencies that their land should be excluded from CWA jurisdi ction, and with no guarantee that they will succeed in that effort.

D. The Final Rule Harms Plaintiffs

85. The Final Rule harms Plaintiffs by (1) expanding th e number of waters subject to federal regulation; (2) eroding the states' authori ties over their own waters; (3) increasing the states' burdens and diminishing the states' abiliti es to administer their own programs; and (4) undermining the states' sovereignty to regulate the ir internal affairs as guaranteed by the Constitution.

86. In their own economic analysis of the Final Rule, t he Federal Agencies estimate that had the Final Rule been in place during fiscal years 2013 and 2014 the agencies would have found that an additional 2.84 to 4.65 percent of "waters" were subject to CWA jurisdiction.[7] This contradicts the Federal Agencies' statement in the preamble to the Final Rule: "The scope of jurisdiction in this rule is narrower than that und er the existing regulation. Fewer waters will be defined as 'waters of the United States' under the rule than under the existing regulations." Final Rule at 37,054.

87. As a result, Plaintiffs will be required to establi sh water quality standards under CWA Section 303, 33 U.S.C. § 1313, for miles of new ly regulated waters that will likely include

[7] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 12–13, http://www2.epa.gov/sites/producti on/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

ephemeral tributaries, innumerable ponds, prairie p otholes, Texas coastal prairie wetlands, and ditches. The states will be required to certify that federal actions meet those standards under CWA Section 401, 33 U.S.C. § 1341. This will impose sig nificant, immediate harms to the states and state agencies involved in this action.

88. The Final Rule erodes Plaintiffs' authorities over their waters. The CWA clearly states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, r educe, and eliminate pollution, to plan the development and use . . . of land and water resourc es . . . ." 33 U.S.C. § 1251(b). Moreover, the Tenth Amendment provides States with traditional authority over their own lands and waters. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (holding that "regulation of land use [is] a function traditionally performed by local governments"). The Federal Rule would shift primary responsibility over traditional state lands and waters from the States to the federal government. This will impose significant, immediate harms to the States and state agencies involved in this action.

89. The Final Rule drastically increases Plaintiffs' bu rdens and harms Plaintiffs' abilities to administer their state programs. Becau se the Final Rule expands federal jurisdiction, state agencies will be forced to devote more resour ces to procuring CWA section 402 and 404 permits. For example, because the Final Rule define s "tributaries" to include ditches and flood channels, as well as features like prairie potholes and Texas coastal prairie wetlands, agencies will be forced to obtain CWA section 402 and/or 404 permits for work in those areas that may disturb

soil or otherwise add any pollutant that could affe ct those features. Individual CWA section 404 permits have a median cost of $155,000 and can take more than a year to obtain.[8]

90. Given the jurisdictional uncertainty that will be c aused by the Federal Agencies' definition of "adjacent waters" and the unpredictab ility of the Federal Agencies' significant nexus analysis, cautious, law-abiding landowners—includin g governmental entities—will be forced to expend resources if there is even a remote possibility that a project may affect a water of the United States. Moreover, the vagueness of the Final Rule and the requirement of states to inquire whether waters, on a case-by-case basis, are subject to CWA jurisdiction, tortures any notion that land- and water-use are traditional rights and responsibilities of the states.

91. These factors will impose significant, immediate ha rms to the States and state agencies involved in this action.

IV. CLAIMS FOR RELIEF

Claim One: The Final Rule Violates the Administrative Procedure Act

92. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as if set forth in full herein.

93. Under the APA, a final agency action may be held un lawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .; in excess of statutory jurisdiction, authority or limi tations . . .; or without observance of procedure required by law." 5 U.S.C. § 706(2).

94. The Clean Water Act only authorizes the Federal Age ncies to assert jurisdiction over "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344, 1362(7).

[8] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 35–39, http://www2.epa.gov/sites/producti on/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

95. The Final Rule exceeds the Federal Agencies' statutory authority and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" because it confers jurisdiction to the Federal Agencies over lands and waters that fall outside of the law established by the Clean Water Act, as interpreted by *Riverside Bayview*, *SWANCC*, and *Rapanos*. *See* 5 U.S.C. § 706(2).

96. Secondly, under the APA, an agency must provide a "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ." 5 U.S.C. §§ 553(b)–(c). This requirement includes the requirement that an administrative agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule as originally proposed. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). And a final rule is a logical outgrowth of a proposed rule only to the extent that interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

97. For the reasons above, the Final Rule is not a "logical outgrowth" of the proposed rule. Therefore, the Final Rule violates the APA, 5 U.S.C. §§ 553(b)–(c).

Claim Two: The Final Rule Violates the Commerce Clause

98. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as if set forth in full herein.

99. The federal government lacks a general police power and may only exercise powers expressly granted to it by the Constitution. *See* U.S. CONST., amend. X.; *United States v. Lopez*, 514 U.S. 549, 566 (1995).

100. The Clean Water Act was enacted pursuant to Congres s's authority to regulate interstate commerce under Article I, Section 8 of the Constitution. As a result, the Federal Agencies violate the Constitution when their enforcement of the Clean Water Act extends beyond the regulation of interstate commerce. *See SWANCC*, 531 U.S. at 173; *see also United States v. Darby*, 312 U.S. 100, 119–20 (1941) (holding Congress may r egulate intrastate activity only where the activity has a "substantial effect" on interstate c ommerce).

101. The Final Rule violates the Constitution because it will subject to Clean Water Act jurisdiction thousands of miles of intrastate water s that have no substantial effect on interstate commerce. Regulating these waters falls outside the scope of Congress's—and, therefore, the Federal Agencies'—constitutional authority.

102. Therefore, the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .; in excess of stat utory jurisdiction, authority or limitations . . . ; or without observance of procedure required by law." 5 U.S.C. § 706(2).

C. Claim Three: The Final Rule Violates State Sovereignty and the Clear Statement Canon

103. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as set forth in full herein.

104. Under the Tenth Amendment, "[t]he powers not delega ted to the United States by the Constitution . . . are reserved to the States r espectively, or the people." U.S. CONST., amend. X.

105. The Final Rule encroaches upon the rights of the states to regulate lands within their borders. Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. Authority over these functions is reserved, traditi onally, to the states under the Tenth

Amendment. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' tradition al and primary power over land and water use"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("Among the rights and powers reserved to the States under the Tenth Amendment is the authority to its land and water resources."); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"); *see also* 33 U.S.C. § 1251(b).

106. The courts traditionally expect "a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into tradition al state authority." *Rapanos*, 547 U.S. at 738 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). The phrase "the waters of the United States" does not constitute such a clear and manifest statement. *Id.* On the contrary, the Clean Water Act instructs the Federal Agencies to " recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). Thus, "wher e an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly c ontrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

107. Therefore, the Final Rule violates the Tenth Amendment, the clear statement canon, and 33 U.S.C. § 1251(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Adjudge and declare that the rulemaking titled "Cle an Water Rule: Definition of 'Waters of the United States,'" promulgated in 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 is unlawful because it is inconsistent

with, and in excess of, the EPA's and U.S. Army Cor ps of Engineers' statutory authority under the CWA;

(2) Adjudge and declare that the Final Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(3) Adjudge and declare that the Final Rule violates the Constitution of the United States.

(4) Vacate the Final Rule;

(5) Award Plaintiffs their reasonable fees, costs, expe nses, and disbursements, including attorney's fees, associated with this litigation; a nd grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, Texas Water Development Board, STATE OF LOUISIANA, and STATE OF MISSISSIPPI, *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works). *Respondents.*	Case No. 15-60492

PETITION FOR REVIEW

Pursuant to Section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas, Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, Texas Water Development Board, State of Louisiana, and State of Mississippi petition the Court for

review of the rulemaking titled "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated on June 29, 2015, by Respondents United States Environmental Protection Agency and United States Army Corps of Engineers. 80 Fed. Reg. 37,054 (June 29, 2015) ("Final Rule"). A copy of the Final Rule is enclosed with this filing.

Petitioners file this Petition for Review only out of an abundance of caution, and believe the Petition should be dismissed for lack of jurisdiction. In the Final Rule, EPA and the Corps suggest that a challenge to the Final Rule may fall within the court of appeals' jurisdiction under 33 U.S.C. § 1369(b)(1). *See* 80 Fed. Reg. at 37,104. Petitioners believe this is clearly incorrect as a matter of law, and that jurisdiction to review the Rule lies with district courts under 28 U.S.C. § 1331. *See Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012). Nevertheless, Petitioners file this Petition for Review as a protective matter, consistent with established practice. *See Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve*, 551 F.2d1270, 1280 (D.C. Cir 1997) ("If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court or, since there would be no time bar to a proper action in the district court, bring suit only in the court of appeals."). Petitioners have also filed a complaint in the U.S. District Court for the Southern District of Texas, challenging the Final Rule on similar grounds as those that would be the subject of this Petition for Review.

Dated: July 13, 2015

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ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS,
Railroad Commission of Texas, and
Texas Commission on Environmental Quality,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

Case No. 16-1257

ORIGINAL

PETITION FOR REVIEW

In accordance with the Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), petitioners the State of Texas, the Railroad Commission of Texas, and the Texas Commission on Environmental Quality, hereby petition this Court for review of respondent United States Environmental Protection Agency's final actions entitled: "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35824. (June 3, 2016), a copy of which is enclosed with this filing (Attachment 1).

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1).

Dated: July 27, 2016

Respectfully submitted,

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Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS and
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and
REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency

Respondents.

Case No. 15-1494

PETITION FOR REVIEW

In accordance with 5 U.S.C. § 702, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15(a), petitioners the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of respondent United States Environmental Protection Agency's final action entitled "National Ambient Air Quality Standards for Ozone," 80 Fed. Reg. 65292 (October 26, 2015), a copy of which is enclosed with this filing. This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1).

Dated: December 22, 2015

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	)	
Petitioners,	)	
v.	)	**Case No. _____**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas and the Texas Commission on Environmental Quality ("TCEQ") petition the Court for review of the Texas-applicable portions of the United States Environmental Protection Agency's ("EPA") final action on rulemaking titled *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and*

Malfunction, published in the *Federal Register* at 80 Fed. Reg. 33,839 on June 12, 2015, and attached to this petition as Exhibit 1.

Specifically, the State and TCEQ request that the Court review those parts of EPA's Final Rule that apply to the State of Texas, including: 1) EPA's finding under 42 U.S.C. § 7410(k)(5) that four provisions in Texas's approved State Implementation Plan ("SIP") (*i.e.*, 30 Tex. Admin. Code § 101.222(b), (c), (d) and (e), which provide affirmative defenses for certain upset events, unplanned events, and opacity events), "are substantially inadequate to meet [Clean Air Act] requirements"; and 2) EPA's "SIP call with respect to these provisions." 80 Fed. Reg. 33,968–69 (June 12, 2015).

Respectfully submitted,

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ATTORNEYS FOR THE STATE OF TEXAS AND THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE, on behalf of the PEOPLE OF MICHIGAN, and the STATES OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, KENTUCKY, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, WISCONSIN, and WYOMING, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PUBLIC UTILITY COMMISSION OF TEXAS, and RAILROAD COMMISSION OF TEXAS,

Petitioners,

v. Case No. 16-1204

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, Fed. R. App. P. 15(a), Michigan Attorney General Bill Schuette, on behalf of the People of Michigan, the States of Alabama, Arizona, Arkansas, Kansas, Kentucky, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming, and the Texas Commission on Environmental Quality, Public

Utility Commission of Texas, and Railroad Commission of Texas hereby petition for review of the final action of the United States Environmental Protection Agency published in the Federal Register at 81 Fed. Reg. 24,420 (April 25, 2016) and titled "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units."

Respectfully submitted,

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Dated: June 23, 2016

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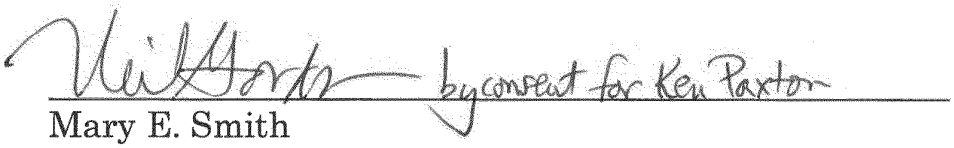

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Counsel for the State of Texas, Texas Commission on Environmental Quality, Public Utility Commission of Texas, and Railroad Commission of Texas

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA,
STATE OF TEXAS,
STATE OF ALABAMA,
STATE OF ARIZONA CORPORATION COMMISSION,
STATE OF ARKANSAS,
STATE OF COLORADO,
STATE OF FLORIDA,
STATE OF GEORGIA,
STATE OF INDIANA,
STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
ATTORNEY GENERAL BILL SCHUETTE, People of Michigan,
STATE OF MISSOURI,
STATE OF MONTANA,
STATE OF NEBRASKA,
STATE OF NEW JERSEY,
STATE OF NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,
STATE OF OHIO,
STATE OF SOUTH CAROLINA,
STATE OF SOUTH DAKOTA,
STATE OF UTAH,
STATE OF WISCONSIN, and
STATE OF WYOMING,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and REGINA A. MCCARTHY, Administrator, United States Environmental Protection Agency,

PETITION FOR REVIEW

Case No. 15-1363

ORIGINAL

Respondents.

The States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, and the State of North Carolina Department of Environmental Quality hereby petition this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and 5 U.S.C. § 702, for review of the final rule of the United States Environmental Protection Agency published in the Federal Register at 80 Fed. Reg. 64,662 (October 23, 2015) and titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units." This Court has jurisdiction, and is a proper venue for this action, under 42 U.S.C. § 7607(b)(1).

Petitioners will show that the final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law. Accordingly, Petitioners ask the Court to hold unlawful and set aside the rule, and to order other such relief as may be appropriate. *See* 42 U.S.C. § 7607(d).

Dated: October 23, 2015

Respectfully submitted,

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ATTACHMENT 3B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WISCONSIN, *et al.*,	
Petitioners,	
v.	**No. 16-1406 and Consolidated Cases**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and Regina A. McCarthy, Administrator, United States Environmental Protection Agency	
Respondents.	
STATE OF TEXAS and the TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	
Petitioners,	**No 16-1428**
v.	
UNITED STATES ENRIRONMENTAL AGENCY,	
Respondent.	

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas, and the Texas Commission on Environmental Quality, challenge the legality of the United States Environmental Protection Agency ("EPA") rulemaking entitled "Cross-State Air Pollution Rule Update for the

2008 Ozone NAAQS; Final Rule," published at 81 Fed. Reg. 74,504 (October 26, 2016) ("Final Rule"), and respectfully submit this preliminary and non-binding statement of issues:

1. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA failed to give independent significance to the distinct and separate requirements of Section 110(a)(2)(D)(i)(I) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I).

2. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA proposed a federal implementation plan for States before the EPA acted on state implementation plans, which States, such as Texas, previously submitted to implement § 7410(a)(2)(D)(i)(I).

3. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because the EPA fails to properly consider actual monitoring data and trends, and impermissibly relies on a model that is flawed with inappropriate assumptions and conditions.

Respectfully submitted,

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Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY and E. Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency, Respondents.	No. 17-1021 (and consolidated cases)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas and the Texas Commission on Environmental Quality, challenge the legality of the United States Environmental Protection Agency ("EPA") rulemaking entitled "Protection of Visibility: Amendments to Requirements for State Plans," published at 82 Fed. Reg. 3,078 (Jan. 10, 2017) ("Final Rule"), and respectfully submit this preliminary and non-binding statement of issues:

1. Section 169A(d) of the Clean Air Act, 42 U.S.C. § 7491(d), provides that States shall consult and consider the conclusions and recommendations of a federal land manager ("FLM") when accepting public comment on state

implementation plans prepared to address the regional haze and visibility requirements of the Clean Air Act. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because it converts the statutory discretion States have in considering the conclusions of a federal land manager into a mandatory requirement that States must respond through costly formal revision of their regional haze state implementation plan. In particular, the Final Rule improperly mandates that States must revise their regional plans in response to a federal land manager's certification of reasonably attributable visibility impairment for a Class I air quality area listed pursuant to 42 U.S.C. § 7491(a).

2. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because it fails to properly address the impacts of international emissions of pollutants on visibility in Class 1 areas in the United States, especially those areas along or near an international border. In particular, the Final Rule fails to provide approved methodologies for states to address impacts from international emissions of pollutants and natural haze from the determination of reasonable progress toward reducing man-made pollution sources that effect visibility in Class I air quality areas.

3. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA did not properly consider the disproportionate costs imposed upon States to meet non-health based visibility goals,

which are more burdensome and costly to meet than health-based national ambient air quality standards. The burdens and costs to meet such goals are wholly disproportionate to any net benefit sought.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 25, I hereby certify that on March 31, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all CM/ECF registered counsel in this case, and all consolidated cases.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al. *Respondents*.	Case No. 16-1257 (Consolidated with Nos. 16-1242, 16-1262; 16-1263; 16-1264; 16-1266, 16-1267; 16-1269; and 16-1270)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas, the Railroad Commission of Texas, and the Texas Commission on Environmental Quality, challenge the legality of the United States Environmental Protection Agency ("EPA") rulemaking entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," published at 81 Fed. Reg. 35824 (June 3, 2016) ("Final Rule"), and respectfully submit this preliminary and non-binding statement of issues:

1. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA included facility source categories not originally included or contemplated in the listing of source categories as previously determined by the EPA under Section 111(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(b);

2. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA did not prepare an independent

endangerment finding for methane, which is used in the Final Rule as an improper surrogate for all other "greenhouse gases" included in the Final Rule;

3. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA did not prepare an independent endangerment finding for the oil and gas source category to establish standards of performance for methane and other greenhouse gas emissions from such sources in accordance with Sections 111(b) and 111(f) of the CAA, 42 U.S.C. §§ 7411(b) and 7411(f), and, therefore, the EPA failed to properly evaluate the scientific evidence concerning the effect of greenhouse gas emissions from the oil and gas source category, in particular methane, and otherwise disregarded data and analyses that conflicts with its decision to create standards for emissions of greenhouse gases from oil and gas facilities; and

4. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because the EPA did not base its cost/benefit estimates on reasoned bases and analyses, and, therefore, the EPA failed to properly consider the complete regulatory burden of the Final Rule on Texas' regulatory agencies and the oil and gas industry in Texas.

Respectfully Submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on August 29, 2016, I served the foregoing document on all registered counsel in this case, and all consolidated cases, through the Court's CM/ECF system.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al. *Respondents*.	Case No. 15-1494 (Consolidated with Nos. 15-1385, 15-1392, 15-1490, and 15-1491)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas and the Texas Commission on Environmental Quality, challenge the legality of the final agency rule entitled "National Ambient Air Quality Standards for Ozone," published at 80 Fed. Reg. 65292 (Oct. 26, 2015), and respectfully submit this preliminary and non-binding statement of issues:

1. Whether EPA's revision of the national ambient air quality standard for ozone ("ozone NAAQS") was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the Clean Air Act ("CAA") or any other laws;

2. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because EPA failed to consider the effects that an unnecessarily stringent standard would have on Texas's social, economic, and sovereign interests;

3. Whether EPA 's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA failed to properly evaluate the scientific evidence and disregarded data and analyses that conflicted with its decision to lower the ozone NAAQS from 75 parts per billion ("ppb") to 70 ppb;

4. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA disregarded evidence showing that lowering the ozone NAAQS was unnecessary to protect human health;

5. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA ignored analyses from the Texas Commission on Environmental Quality and other entities that show no difference in ozone-inhaled dosage between 70 and 75 ppb;

6. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA failed to consider background levels of ozone, including those caused by mobile sources, stratospheric intrusion, bordering states, the Texas-Mexico border, as well as exceptional events and other factors over which Texas has no control;

7. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA set a standard impossible for Texas to attain;

8. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because Texas is still devoting resources and working toward attaining the 2008 ozone NAAQS, making EPA's action premature and unnecessary; and

9. EPA's revision of the ozone NAAQS forms part of larger, comprehensive framework of recent rules promulgated by the EPA, some of which target the same underlying air pollutants at issue in the ozone NAAQS. EPA's other rule promulgations are the subject of meritorious challenges in this and other circuits. EPA has failed to consider the comprehensive social, economic, and health effects of these other rule changes, if implemented, and whether those rules will achieve the social, economic, and health effects intended in *this* promulgation—therefore subjecting Texas and other entities to duplicative and unnecessary expenditures.

Respectfully Submitted,

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Attorney General of Texas

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COUNSEL FOR PETITIONERS,
STATE OF TEXAS AND TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on February 3, 2016, I served the foregoing Petitioners' Non-Binding Statement of Issues on all registered counsel in this case, and all consolidated cases, through the Court's CM/ECF system.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHEASTERN LEGAL FOUNDATION, INC. ***Petitioner*,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*.,** ***Respondents*.**	)	**Case No. 15-1166**
STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, ***Petitioners*,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,** ***Respondents*.**	)	**Case No. 15-1308 (consolidated with No. 15-1166 and other consolidated cases)**

STATE OF TEXAS AND TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S NONBINDING STATEMENT OF ISSUES

The State of Texas and the Texas Commission on Environmental Quality (collectively, the State of Texas), the petitioners in Case No. 15-1308 (consolidated

under Lead Case No. 15 -1166), submit this nonbinding statement of issues in this proceeding challengin g the final action of the respondent United States Environmental Protection Agency (EPA) entitled *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction*, 80 Fed. Reg. 33,839 (June 12, 2015) (Final Rule).

The following is a nonexclusive and nonbinding list of issues that the State of Texas may raise in this case:

1. Whether EPA's "substantial inadequacy" finding and "SIP Call" of Texas's state implementation plan (SIP) based on Texas's inclusion of affirmative defenses for maintenance, startup, and shutdown activities is unlawful and arbitrary and capricious because EPA failed to consider the language of 30 Texas Administrative Code § 101.222(f), providing that Texas's affirmative defense "applies only to violations of state implementation plan requirements [and] . . . cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63";

2. Whether EPA's substantial inadequacy finding and SIP Call with regard to Texas's affirmative defense provisions is unlawful and arbitrary and

capricious based on the undisputed agency record that shows that Texas's affirmative defenses do not negate United States District Court jurisdiction;

3. Whether EPA must identify a specific provision of the Clean Air Act that Texas's affirmative defense provisions violate as a prerequisite to issuing a SIP Call;

4. Whether 42 U.S.C. § 7410(k)(5) permits EPA to issue a SIP Call when the only basis for that SIP Call is that a SIP provision is inconsistent with a newly issued EPA policy statement;

5. Whether EPA has provided any rational basis to determine that previously approved affirmative defenses for periods of maintenance, startup, and shutdown activities are now substantially inadequate to comply with the Clean Air Act;

6. With regard to Texas's SIP, whether EPA failed to comply with the statutory procedural requirements under 42 U.S.C. § 7607(d)—to include the requirement to provide an explanation of the "major legal interpretations and policy considerations underlying the proposed rule";

7. Whether EPA's revised policy disallowing the use of exemptions and affirmative defenses for periods of maintenance, startup, and shutdown activities is contrary to law, of any legal effect, entitled to any deference, or even enforceable;

8. Whether EPA's substantial inadequacy finding and SIP Call of Texas's SIP is unlawful and arbitrary and capricious because EPA's only stated rationale for its decision (that Texas's affirmative defense provisions "alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits," 79 Fed. Reg. 55,945) is barred by principles of res judicata, claim preclusion, and issue preclusion by the Fifth Circuit Court of Appeals decision in Luminant Generation. *Luminant Generation Co. LLC v. Envtl. Prot. Agency* , 714 F.3d 841, 853 n. 9 (5th Cir. 2013) (holding that the same Texas affirmative defenses at issue here do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties. . . . ");

9. Whether EPA's substantial inadequacy finding and SIP Call as to Texas's maintenance, startup, and shutdown affirmative defenses is unlawful and arbitrary and capricious because EPA's action di rectly contravenes the lawfully issued mandate in Luminant Generation. *Id*;

10. Whether EPA failed to meet its burden under 42 U.S.C. § 7410(k)(5) to demonstrate that the inclusion of affirmative defenses for maintenance, startup, and shutdown activities in Texas's SIP is substantially inadequate to co mply with the provisions of the Clean Air Act —particularly in light of the *Luminant Generation*

decision, holding that the affirmative defense provisions in Texas's SIP were compliant with the Clean Air Act. *Id*;

11. Whether EPA's disregard of the *Luminant Generation* decision is unlawful under this Court's decision in *NEDACAP v. EPA* and in light of EPA's regional consist ency regulations. *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. Envtl. Prot. Agency*, 752 F.3d 999 (D.C. Cir. 2014);

12. Whether EPA may use venue provisions under 42 U.S.C. § 7607(b)(1) and a self-declaration of "nationwide scope or effect" finding to circumvent binding Fifth Circuit Court of Appeals precedent; and

13. Whether EPA improperly relied on this Court's opinion in *NRDC v. EPA* to find Texas's affirmative defense provisions to be invalid —ignoring a Fifth Circuit Court of Appeals finding to the contrary *Compare Natural Res. Def. Council v. Envtl. Prot. Agency*, 749 F.3d 1055 (D.C. Cir. 2014), *with Luminant Generation*, 714 F.3d 841, 853 n. 9.

The State of Texas Petitioners submit these issues as a nonbinding statement only and reserve the right to raise other issues in merits briefing before the Court.

Respectfully submitted,

/s/ *Kellie E. Billings-Ray*
Kellie E. Billings-Ray

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In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE, on behalf of the PEOPLE OF MICHIGAN, and the STATES OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, KENTUCKY, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, WISCONSIN, and WYOMING, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PUBLIC UTILITY COMMISSION OF TEXAS, and RAILROAD COMMISSION OF TEXAS,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Case No. 16-1204/
Lead Case No. 16-1127
(and consolidated cases)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES TO BE RAISED

Pursuant to the Court's Order of June 30, 2016, Petitioners in Case No. 16-1204 hereby submit the following non-binding statement of issues to be raised:

1. Whether the final action of the United States Environmental Protection Agency ("EPA") published in the Federal Register at 81 Fed.

Reg. 24,420 (April 25, 2016) and titled "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units" ("Supplement Finding") violates Section 112(n)(1)(A) of Clean Air Act, 42 U.S.C. § 7412(n)(1)(A), the Supreme Court's decision in *Michigan v. EPA*, 135 S.Ct. 2699 (2015), or is otherwise arbitrary, capricious, or unlawful because it is based on reductions in the emission of air pollutants that are not hazardous air pollutants and that are irrelevant to a finding of whether it is appropriate and necessary to regulate hazardous air pollutants under Section 112 of the Clean Air Act.

2. Whether EPA's Supplemental Finding violates Section 112(n)(1)(A) of the Clean Air Act, the Supreme Court's decision in *Michigan v. EPA*, or is otherwise arbitrary, capricious, or unlawful because EPA failed to balance the relevant costs and benefits.

3. Whether EPA's Supplemental Finding violates Section 112(n)(1)(A) of the Clean Air Act, the Supreme Court's decision in *Michigan v. EPA*, or is otherwise arbitrary, capricious, or unlawful because EPA failed to demonstrate that concentrations of particulate matter smaller than 2.5 micrometers in diameter ($PM_{2.5}$) in the ambient

air below the National Ambient Air Quality Standards for $PM_{2.5}$ provide public health benefits.

Respectfully submitted,

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Dated: July 29, 2016

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15-1363 (and consolidated cases)

PETITIONERS' NONBINDING STATEMENT OF THE ISSUES TO BE RAISED

Pursuant to this Court's o rder dated November 30, 2015, *see* ECF 1585786, Petitioners in lead case No. 15-1363 and consolidated case No. 15-1409 submit the following nonbinding statement of issues to be raised in this proceeding reviewing the final rule of the United States Environmental Protection Agency (EPA) entitled, "Carbon Pollution E mission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"):

Core Legal Issues

1. Whether the Rule, which regulates existing power plants under CAA § 111(d), 42 U.S.C. § 7411(d), is unlawful because EPA has regulated the same power plants under CAA § 112, 42 U.S.C. § 7412.

2. Whether EPA has the authority to force States to transform thei r energy economies to favor only certain sources of electricity, under the guise of regulating power plants under CAA § 111(d), 42 U.S.C. § 7411(d).

3. Whether EPA's authority is limited to promulgating regulations to establish a "procedure" under which Stat es submit implementation plans in which the States establish "standards of performance" for existing sources under CAA § 111(d), 42 U.S.C. § 7411(d)(1).

4. Whether EPA's threat that it will seize control over the States' energy economies if they do not submit state plans violates the States' rights under the Tenth Amendment and the Federal Power Act, 16 U.S.C. § 824(a).

Programmatic or Record-Based Issues

1. Whether the Rule is unlawful because it is not a logical outgrowth of the proposed rule.

2. Whether the Rule' s exclusion of certain categories of sources of zero emission energy and sources of energy efficiency from the special incentives created under the Clean Energy Incentive Program is unlawful.

3. Whether the Rule allowing cap and trade as a compliance option f or meeting a "performance standard" is unlawful.

4. Whether the Rule requiring State Plans to regulate new, existing, or modified sources through means which include leakage provisions, set asides, and new source complements is unlawful.

5. Whether the Rule allowing States that choose a mass-based compliance plan to adopt a "state measures approach" and denying this option to States that choose a rate-based compliance plan is unlawful.

6. Whether the Rule's limitations on trading between rate-based and mass-based States are unlawful.

7. Whether the Rule is unlawful and violates due process because fundamental elements critical to the Rule are uncertain or unknown, including technical issues relating to emission rate credits (ERCs), or are currently non-final agency action, including the model trading rules and the federal plan

8. Whether the Rule's treatment of existing nuclear energy sources in Arkansas, particularly EPA's refusal to provide clean energy credit for Entergy's Arkansas Nuclear One power plant, is unlawful.

9. Whether EPA's failure to consider Florida's unique peninsular geography and the fact that only two States border Florida, thus limiting Florida's power transfer opportunities, is unlawful.

10. Whether EPA's failure to allow Florida to receive credit for decreases in emissions already achieved is unlawful.

11. Whether EPA's assumptions regarding the extent of renewable generation that could be developed in Florida and used to offset emissions from fossil fuel sources without accounting for intricacies and constraints on purchasing renewable energy under Florida law is unlawful.

12. Whether the Rule's failure to provide a method to account meaningfully for over three billion dollars in stranded investments made by Kansas utilities to install criteria pollutant control equipment on power plants in that State, is unlawful.

13. Whether the Rule's failure to provide compliance credit or emission rate credits for New Jersey's pre-2013, multi-billion dollar ratepayer investments in renewable energy, energy efficiency, and nuclear construction and uprates is unlawful.

14. Whether EPA has the authority to require New Jersey, an energy deregulated State that has chosen to eliminate the traditional retail monopoly structure which electric public utilities had previously held in th is State for electric power generation and supply services, to enact a new legislative scheme so that New Jersey can exercise the authority over electric generation facilities that is required to comply with the Clean Power Plan.

15. Whether the Rule's failure to significantly account for the cost of achieving emissions reductions in New Jersey is unlawful.

16. Whether the Rule's effect of severely limiting fuel diversity in New Jersey, thereby presenting significant reliability and cost concerns, especially during bouts of extreme weather, is unlawful.

17. Whether the Rule unlawfully threatens the reliability of electric supply in the South Dakota because the only coal -fired power plant and the only natural gas-fired power plant in the State lack common ownership, have different regional transmission operators, and do not share a common customer base.

18. Whether the Rule unlawfully forces Texas to redesign the Electric Reliability Council of Texas ("ERCOT"), which is the only Independent System Operator in the continental United States that operates an electricity market that is wholly contained within one State and is not synchronously interconnected with the rest of the country, and which has otherwise been a vibrant and extremely successful competitive wholesale and reta il electricity market for Texas.

19. Whether Texas is being unlawfully punished by the Rule as a first mover in the area of wind energy because, under the Rule, none of the renewable energy installed prior to January 6, 2013 (or capacity upgrades to existing renewable energy completed prior to that date) can be used by generators or the State to demonstrate compliance with the Rule.

20. Whether the Rule unlawfully applied a 4.3% heat rate improvement to Wisconsin steam power plants.

21. Whether the Rule unlawfully failed to consider biomass energy in developing the Wisconsin emission standard.

22. Whether EP A unlawfully failed to consider the im pact of the Rule throughout Wyoming on the greater sage grouse and other sensitive species.

Dated: December 18, 2015

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH DAKOTA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15-1381 (and consolidated cases)

PETITIONERS' NONBINDING STATEMENT OF THE ISSUES TO BE RAISED

Pursuant to this Court's order dated November 6, 2015, *see* ECF 1582440, Petitioners in case No. 15-1399 (consolidated with case No. 15-1381) submit the following nonbinding statement of issues to be raised in this proceeding:

1. Whether EPA's inclusion of carbon capture and storage (CCS) as part of the "best system of emission reduction" is improper because EPA fails to meet its burden to show that CCS is an "adequately demonstrated" technology as required by Clean Air Act Section 111(b), 42 U.S.C. § 7411.

2. Whether EPA failed to meet its burden to show that CCS is adequately demonstrated, because EPA improperly characterized the "adequately demonstrated" legal standard, as set out by Clean Air Act Section 111(b), 42

U.S.C. § 7411, as requiring merely a showing of the technology's "technical feasibility."

3. Whether EPA's inclusion of CCS as part of the "best system of emission reduction" is improper because EPA failed to meet its burden to show that CCS is the "best system" considering costs as required by Clean Air Act Section 111(b), 42 U.S.C. § 7411.

4. Whether EPA has failed to demonstrate that an emission standard of 1,400 lbs. CO_2/MWh, which effectively mandates that affected sources install CCS, is achievable as required by Clean Air Act Section 111(b), 42 U.S.C. § 7411.

5. Whether EPA violated the Energy Policy Act of 2005 by impermissibly considering government-funded technologies from facilities awarded either Clean Coal Power Initiative funding, *see* 42 U.S.C. § 15962, or Section 48A tax credits, *see* 26 U.S.C. § 48A, as evidence that CCS is an adequately demonstrated technology for purposes of Clean Air Act Section 111(b), 42 U.S.C. § 7411.

6. Whether EPA's decision to implement stringent new source performance standards is arbitrary and capricious because EPA's rule will, by EPA's admission, result in negligible CO_2 emission reductions.

7. Whether EPA failed to properly consider whether CO_2 emissions from new fossil fuel -fired power plants are "reasonably . . . anticipated to endanger public health or welfare" as required for EPA to regulate under Clean Air Ac t § 111(b), 42 U.S.C. § 7411.

8. Whether EPA's failure to adequately address infrastructure and carbon dioxide transportation costs in States without storage capacity violates the Administrative Procedures Act, 5 U.S. Code § 701 *et seq*.

Dated: December 7, 2015

Respectfully submitted,

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To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
Cc: Smith, Suzanne[Smith.Suzanne@epa.gov]
From: Payne, James
Sent: Fri 4/21/2017 3:31:03 AM
Subject: Fwd: Write-up With Background on TCEQ Legal Objections
Writeup on Background of Legal Objections for Laywer to Laywer Discussion.docx
ATT00001.htm

Hi - forwarding this initial backgrounder on state law. Jim

Sent from my iPhone

Begin forwarded message:

From: "Tomasovic, Brian" <Tomasovic.Brian@epa.gov>
Date: April 20, 2017 at 9:45:55 PM CDT
To: "Zenick, Elliott" <Zenick.Elliott@epa.gov>, "Smith, Kristi" <Smith.Kristi@epa.gov>
Cc: "Smith, Suzanne" <Smith.Suzanne@epa.gov>, "Thomas, Carrie" <Thomas.Carrie@epa.gov>, "Anderson, Lea" <anderson.lea@epa.gov>, "Hogan, Stephanie" <Hogan.Stephanie@epa.gov>, "Marks, Matthew" <Marks.Matthew@epa.gov>, "Payne, James" <payne.james@epa.gov>
Subject: Write-up With Background on TCEQ Legal Objections

Elliot and Kristi,

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Caroline Sweeney is who Jim Payne would be calling about setting up another call, if we believe we need one. Preferably, Jim would be able to explain the need for a new call based on certain HQ attorneys needing to join/rehear the discussion or new questions.

Threshold Questions:

1. Does anything about my write-up change the need for a call? Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

2. If we are to have a call, what is the set-up to be? Should there be a pre-call regarding my write-up or anything else? Do you envision who you is expected for HQ participation?

We'll appreciate your input on how to proceed.

And I'll be pleased to set up any internal call or answer any questions about the attached write-up.

Brian

Brian Tomasovic

U.S. EPA Region 6 | Office of Regional Counsel

tomasovic.brian@epa.gov | 214.665.9725